TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 179.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS OF CONSTANCE K. VERTNER, DECEASED, AND LILLIE K. VERTNER, APPELLANTS,

vs.

GABRIELLA K. JORDAN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 10, 1906.

(20,042.)

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SUPREME COURT OF THE UNITED STATES

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No. 540.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS OF CONSTANCE K. VERTNER, DECEASED, AND LILLIE K. VERTNER, APPELLANTS,

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1 In the Court of Appeals of the District of Columbia.

No. 1476.

CHARLES S. LANDRAM ET AL., Executors, Appellants,
vs.
GABRIELLA K. JORDAN.

Supreme Court of the District of Columbia.

No. 22729. In Equity.

GABRIELLA K. JORDAN, Complainant,
vs.
ELIJAH S. DRAKE, Trustee; LEROY M. TAYLOR, Trustee; CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, and LILLIE K. VERTNER, EDMUND K. VERTNER, and THOMAS K. VERTNER, Infants, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:—

(1) *Bill to Review Decree in Eq.* 21422.

Filed Oct. 29, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 22729.

GABRIELLA K. JORDAN, Complainant,
vs.
ELIJAH S. DRAKE, Trustee; LEROY M. TAYLOR, Trustee; CONSTANCE K. VERTNER, and LILLIE K. VERTNER, EDMUND K. VERTNER, and THOMAS K. VERTNER, Infants, Defendants.

To the supreme court of the District of Columbia, holding an equity court:

The said complainant exhibits this her bill of complaint against the above named defendants and thereupon respectfully shows to the court as follows:

2 1. That the said complainant is a citizen of the United States and a resident of the State of New York, and she brings this suit in her own right and as one of the devisees of the last will and testament of Thomas Kearney, deceased.

2. That the said defendants, Elijah S. Drake and Leroy M. Taylor are sued as trustees appointed by the said will. That both of them are citizens of the United States, and that the said Elijah S. Drake is, as complainant is informed and believes, a resident at Port Gibson in the State of Mississippi, and that the said Leroy M. Taylor is a resident of the city of Washington in the District of Columbia. The defendants, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner are citizens of the United States and complainant is informed and believes their place of residence is Luray in the State of Virginia, and they are sued in their own right and as devisees under the said last will and testament of Thomas Kearney, deceased.

Complainant avers that the said defendants, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner are infants.

3. That heretofore, to wit, on the 15th day of May, 1900, the said defendant, Elijah S. Drake one of the said trustees as aforesaid, filed and exhibited his bill of complaint in equity in this honorable court holding an equity court, against the said Leroy M. Taylor, the other said trustee, and the said Constance K. Vertner, and the said Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, infants, and this complainant as defendants to said bill, the said cause being designated and numbered 21,422 upon the equity docket No. 48 of said court; a true and correct transcript of the entire record of said cause duly certified to by the clerk of the said court is herewith filed marked Complainant's Exhibit No. 1, and is prayed to be taken and read with this bill as a part hereof and with the same effect as though the said record or the several parts thereof were copied herein when referred to in any paragraph of this bill.

A duly certified copy of the said will of Thomas Kearney deceased, was filed with his bill by the said trustee Elijah S. Drake marked Exhibit "A" in said cause and was prayed by him to be read as a part of his said bill, all of which will fully and at large appear by reference to the duly certified transcript of the record of said cause No. 21422, equity docket No. 48 filed herewith and marked Complainant's Exhibit No. 1.

4. That said Elijah S. Drake, said trustee, set forth in his said bill in said cause No. 21,422 certain provisions of the said will of said testator relating to and disposing of certain real estate and the rents, revenues and profits arising therefrom, situated in the city of Washington, District of Columbia. Amongst other provisions so set forth are the sixth and eighth items of said will which are in the following words and figures: (Sets out at large items 6 and 8 of said will).

3 5. That the said trustee, Elijah S. Drake, in and by the sixth paragraph of his said bill in said cause alleged and averred as follows:

"6th. Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia and your complainant is advised that the said provisions are void because they attempt to create a perpetuity."

6. That the said Elijah S. Drake, said trustee, in and by the third prayer of his said bill prayed as follows:

"3rd. That by a decree of his honorable court the last will and testament of Thomas Kearney deceased be construed so far as the same deals with the real estate within the District of Columbia therein devised."

7. That this complainant, Gabriella K. Jordan, on the 15th day of May, 1900, in her proper person filed in said cause her separate answer to the said bill of the said Elijah S. Drake, trustee, in the words following:

"This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in the said bill of complaint to be true," as by reference to said transcript of the record of said cause will fully and at large appear.

And that on the said 15th day of May, 1900, the said defendant, Constance K. Vertner, filed her separate answer to the bill of complaint of the said Elijah S. Drake trustee in said cause, to the effect following: That she admitted all the matters and things averred in the said bill of complaint of the said Drake, trustee, and that she was advised and so averred that the said will of her father, Thomas Kearney deceased, is void and of no effect to dispose of the real estate situated in the District of Columbia for the reason that the provisions of said will relating to said real estate attempt to create such an estate as is contrary to the law forbidding the creation of perpetuities. That she and her brother Edmund Kearney were the sole heirs at law of the said Thomas Kearney; that Edmund Kearney died on the 4th day of June, 1898, leaving a widow, Mary B. Kearney, and that she the said Constance K. Vertner was his sole heir at law. That the said Edmund Kearney left a last will and testament, a certified copy of which was filed with said answer and prayed to be read as a part thereof, but that she was advised that the said will of Edmund Kearney is not in proper form to pass the title to real estate within the District of Columbia. That she joined in the prayer of the bill of complaint of the said Drake trustee for a decree declaring the proper construction of the said will of Thomas Kearney deceased so far as it relates to real estate in the District of Columbia.

4 And that on the 22nd day of May, 1900, the said court by its decree in said cause No. 21,422 appointed Fred McKee guardian *ad litem* of the infant defendants in said cause to defend said cause on their behalf, and on said last mentioned day said infant defendants by their said guardian filed their answer in the said cause neither admitting nor denying the matters and things averred in said bill but submitting their interests to the protection of the court.

That on the said 23rd day of May, 1900, the said Leroy M. Taylor filed his answer in said cause No. 21,422 in substance and effect set-

ting forth that he had renounced and declined to act as trustee under the said will of Thomas Kearney deceased, and thereby renewed said renunciation and declination.

And that on the day last mentioned the said complainant, Elijah Drake joined issue with defendants in said cause as follows:

"The complainant joins issue with the defendants and will try the above-entitled cause upon the bill and answers filed therein."

And that thereupon and on the same day the said cause was ordered calendared by the complainant Drake for hearing on the bill and answers for the June term, 1900, of the said court, and was calendared by the clerk.

And that at the June term, 1900, of the said court, the said cause No. 21,422 was set down for hearing and was submitted to and heard by the said court on the pleadings filed therein and at said term, to wit: on the 27th day of June, 1900, the said supreme court of the District of Columbia sitting in equity made, pronounced, passed and entered upon the records and minutes of the court a final decree in said cause No. 21,422, signed by the associate justice of the said court then and there presiding and holding said term by which said final decree the court adjudged, ordered and decreed as follows:

"This cause having been calendared was submitted on the pleadings filed therein and duly considered, it is by the court this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that the said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate, and the same descended to his heirs at law.

JOB BARNARD, *Justice.*

8. That no appeal has been taken from said final decree by any of the parties to said cause No. 21,422 and that the complainant, Gabriella K. Jordan, was greatly injured and grieved by the said final decree, and the construction of the said will by the court and the effect whereof has been, and is, to deprive her of her said property devised to her for life of the said sixth item of the said last will and testament of the — Thomas Kearney, deceased.

9. That the said complainant, Gabriella K. Jordan, avers and insists that the said final decree in said cause No. 21,422 is erroneous and ought to be reviewed, reversed and set aside for many errors and imperfections apparent upon the face of said decree and of the record of the proceedings in the said cause, and the said complainant avers that the said decree amongst other things was erroneous as aforesaid in the following particulars:

(1.) In adjudging, ordering and decreeing relief upon the said bill which should have been dismissed by the court *exmero motu.*

(*a.*) Because the said trustee had no right, title or property in the subject matter of said suit cognizable in a court of equity as would authorize him to institute said suit for the purpose of defeating and frustating the purposes of the said devise in favor of the said Gabriella K. Jordan as declared by the testator in the sixth item of said will.

Stricken out and expunged by order of the court* by order dated 5th Nov. 1903.

(*b.*) Because the institution of the said suit by the said trustee under said will was a breach of his said trust and of the confidence reposed in him whose duty it was to defend the title and interest of the *cestui* [que]* *trust*, Gabriella K. Jordan, thereunder and a court of equity cannot lend its aid to the commission of said breach.

(*c.*) Because said court had no jurisdiction upon the merits of said suit, and for that reason said bill should have by said decree been dismissed.

(2.) In adjudging, ordering and decreeing relief upon said bill in the absence of proper and necessary parties to the suit neither the said Edmund Kearney (if living), or if he were dead, his personal representatives having been made a party, nor any proof made that he died without issue him surviving or that the said Constance K. Vertner was his sole heir at law, or that he died intestate.

(3.) In adjudging, ordering and decreeing adversely to the said complainant, Gabriella K. Jordan, that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same attempt to dispose of lands and tenements lying and being within the District of Columbia are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuties and contrary to the statute in such case made and provided and
6 that the provisions of said will of Thomas Kearney, deceased, are deemed and held to be void and of no effect and that as to said lands and premises the said Thomas Kearney died intestate and that the same descended to his heirs at law, whereby the said Gabriella K. Jordan has been deprived of the devise in her favor provided in the sixth item of the said will whereas said devise is a perfectly legal and valid gift being for the life only of the said Gabriella K. Jordan and not in contravention of the law prohibiting perpetuities nor contrary to any statute and that as to said devise the said Thomas Kearney died testate as to said land and tenements situate in the District of Columbia and mentioned in the sixth item of his said will and that the same did not descend to his heirs at law and that the construction of said will and the sixth item thereof by the said decree in the particulars aforesaid was and is wholly erroneous and wrongful.

[Matter enclosed between rules erased in copy.]
[*Word enclosed in brackets erased in copy.]

In consideration whereof and inasmuch as such errors and imperfections appear in the body of the said decree and in the record of the proceedings in said cause, and there is no proof upon which to base any decree deeming and holding that the testamentary disposition in favor of the said complainant, Gabriella K. Jordan, mentioned and declared in the sixth item of the said will of Thomas Kearney, deceased, to be in violation of the law prohibiting the creation of perpetuities, or contrary to the statue in such case made and provided as to the said real estate situated in the District of Columbia; and that there is no proof upon which to base any decree deeming and holding the said provision of said will to be void and of no effect or that the said Thomas Kearney died intestate as to the said land and premises, or that the same descended to his heirs at law as mentioned and set forth in the said final decree,—the complainant hopes that the said decree will be reversed and set aside and no further proceedings be had thereon.

The premises considered your complainant prays as follows:

I. That the said Elijah S. Drake, trustee, Leroy M. Taylor, trustee, Constance K. Vertner and the said infants Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner may be made parties defendant to this bill, and that the United States writ of subpœna may issue to them requiring them and each of them to appear and answer the exigencies of this bill answers under oath being hereby expressly waived.

II. That a guardian *ad litem* be appointed for the infant defendants Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner to defend this suit in their behalf.

III. That for the reasons and errors and under the circumstances aforesaid, the said final decree may be reviewed and set aside, and no further proceedings be had thereon and that the said complainant Gabriella K. Jordan be permitted to remain in the undisturbed enjoyment of the rents and revenues derived from the real estate situate in the District of Columbia as provided in the sixth item of the said will.

7 IV. And the complainant prays for general relief in the premises.

GABRIELLA KEARNEY JORDAN.

EDMUND BURKE,
Sol. for Complainants.

(Sworn to by complainant 8th day of October, 1901.)

(2) COMPLAINANT'S EXHIBIT No. 1.

Filed October 29, 1901.

Bill.

Filed May 15, 1900.

In the Supreme Court of the District of Columbia.

No. 21422, Equity Docket 48.

ELIJAH S. DRAKE, Trustee, Complainant,
vs.
LEROY M. TAYLOR, Trustee; CONSTANCE K. VERTNER, LILLIE K. VERTNER, EDMUND K. VERTNER, THOMAS K. VERTNER, GABRIELLA K. JORDAN, Defendants.

To the supreme court of the District of Columbia, holding a special term as an equity court:

This complainant respectfully represents:

1st. That he is a citizen of the United States resident at Port Gibson in the State of Mississippi and that he brings this suit as acting trustee under the last will and testament of Thomas Kearney, deceased.

2nd. The defendants are citizens of the United States. The defendant Leroy M. Taylor is a resident of the District of Columbia and is sued as trustee under the last will and testament of Thomas Kearney, deceased. The defendants Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, and Thomas K. Vertner are residents of Luray in the State of Virginia and are sued as devisees under the last will and testament of Thomas Kearney, deceased. The defendants Lillie K. Vertner, Edmund K. Vertner, and Thomas K. Vertner are infants. The defendant Gabriella K. Jordan is a resident of New York in the State of New York and is sued as a devisee under the last will and testament of Thomas Kearney, deceased.

3d. That Thomas Kearney, late of San Antonio in the State of Texas, by his last will and testament dated June 4, 1896, which said will has been duly admitted to probate in Webb county, Texas, a copy recorded in the office of the register of wills of the
8 District of Columbia in Will Book 43 at page 251 *et sequitur* and a certified copy filed herewith, marked Exhibit A, and prayed to be read as a part of this bill, devised to this complainant and the defendant Leroy M. Taylor, real and personal property situate in the District of Columbia and the State of Virginia, in said Exhibit A more particularly described in and upon certain trusts therein set forth and declared.

4th. The defendant Leroy M. Taylor has declined the trusts reposed in him by said last will and testament of Thomas Kearney,

deceased, and your complainant has from the date of said declination acted as sole trustee under said will.

5th. The provisions of the said will of Thomas Kearney that relate to the real estate within the District of Columbia are as follows: (Sets out at large items 5, 6, 7, 8, 15, 17, 18, 19, 20 and 21 of said will.)

* * * * * * *

6th. Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia and your complainant is advised that the said provisions are void because they attempt to create a perpetuity.

The premises considered your complainant prays:

1. That the United States writ of subpœna issue to the defendants requiring them and each of them to appear and answer the exigencies of this bill, answer under oath being hereby expressly waived.

2. That a guardian *ad litem* be appointed for the infant defendants Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, to defend this suit in their behalf.

3. That — a decree of this honorable court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised.

4. That he shall have such other and further relief as the nature of the case shall require.

The defendants to this bill are:

Leroy M. Taylor, trustee, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, Thomas K. Vertner and Gabriella K. Jordan.

THOMAS P. WOODARD,
Solicitor for Complainant.

(Sworn to by complainant 10th. day of April, 1900.)

9 COMPLAINANT'S EXHIBIT A.

Filed May 15, 1900.

STATE OF TEXAS, *County of Webb.*

In the name of God, amen.

I, Thomas Kearney, of San Antonio, Bexar county, Texas, being of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all wills and testaments heretofore made by me.

Item 1. As I owe no debts it is my will that all expenses of my last sickness and funeral expenses be promptly paid by my executors hereinafter named.

Item 2. I own in the State of Virginia the following property viz., the house and lot in the town of Luray, now occupied as a residence by my daughter, Constance K. Vertner.

Item 3. I now own the following property situated in the city of

Washington, D. C., viz.: A lot of ground fronting (150) one hundred and fifty feet, ten inches on "F" street, N. W., and running back along Twentieth street ninety-six feet and four inches, bought by me from Edward Temple and others, trustees of the Bank of Washington. Upon this property I have built eight three story and basement dwelling houses, being numbers 2000, 2002, 2004, 2006, 2008, 2010, 2012, and 2014, all fronting on F street, N. W., and all being situate lots numbers (12 and 13) twelve and thirteen, square (104) one hundred and four of said city; leaving a vacant lot on said square and in rear of said eight houses, which vacant lot fronts about (18) eighteen feet on Twentieth street, and runs back one hundred and fifty feet, ten inches. This vacant lot is also my property. I also own in said city of Washington two lots bought by me from Alfred Stidham and wife; said lots being known as lots number six hundred and eleven, "M" street and six hundred and thirteen, "M" street, N. W. (Signed) Thomas Kearney.

Item 4. I now own the following property in the State of Texas, viz.: (*a*) My ranch lands situated in Webb county, Texas, consisting of 68888 acres of land out of the Balconcitas and Palafox tracts of what is known as Joaquin Galin grant, and for a more specific description of same reference is hereby made to the records of my deeds in the deed records in Webb county; my said lands being known as the "Galvan ranch;" the same being all under fence, but in two separate pastures, which are divided by a road leading from Laredo to Eagle Pass. (*b*) Also house No. 215 Obraja street, and the lots appertaining thereto in the city of San Antonio, Texas, the same being the same property heretofore conveyed by me to william Campbell, an insurance man in said city, by deed of trust of date of August 19th, 1892, in trust for the benefit of Mrs. Lottie Richie during her lifetime.

Item 5. Having full faith in the integrity and business capacity of Dr. Leroy M. Taylor of Washington, D. C., and E. S. Drake of Port Gibson Mississippi, I hereby appoint them and their successors, as hereinafter provided, trustees for the purpose of mananging all the real property in item- 2 and 3 of this will, from and after my death, continuously until the year 1928, subject, however, to the conditions and limitations hereinafter imposed, and devise to them, the said Dr. Leroy M. Taylor of Washington, D. C., and E. S. Drake of Port Gibson, Miss., and their successors, all and singular, the property mentioned in item- 2 and 3 hereof, in trust for the uses and purposes and under the conditions hereinafter mentioned. Said trust to be continued in them and their successors until the first day of January, 1928; said trustees and their successors to have full, free and absolute possession and control of the same until the date last above mentioned, with full power and authority to let and lease the same for said period, and to collect all rents and revenues accruing therefrom, with full power and authority to take all necessary steps either in or out of court to collect said rents and revenues, and to protect and preserve said property; provided that the house and lot in Luray, Virginia, mentioned in item (2) two hereof, shall not without the consent of my said daughter, Constance K. Vertner, be rented during

the lifetime of my said daughter; it being my desire that during the term of her natural life my said daughter shall have the use of said house and premises as a home, and free from any and all charges in the form of rent or otherwise. I desire that said trustees shall out of the rents and revenues derived from the Washington, D. C. property, or from funds coming into their hands under any of the provisions of this will, pay all taxes, insurance and costs of repairs on such premises, as long as my said daughter shall occupy same as a home; and in addition thereto, they, the said trustees, shall out of said rents and revenues, or out of said other funds last above mentioned, pay to my said daughter, Constance K. Vertner, during the term of her natural life the sum of ninety dollars per month, the same to be paid monthly. For the purpose of providing a sum sufficient to make said monthly payments regularly my said trustees are hereby authorized and instructed to, of the

at all times, out of any v moneys or funds, mentioned in this paragraph, take and keep on deposit in some secure bank, at least the sum of one thousand dollars. The object of so keeping said sum of one thousand dollars on deposit is to make sure of their being able to make said monthly payments regularly

* (Signed) Thomas Kearney.

*

and without fail; provided, however, that in case my said daughter shall at any time desire to change her residence, the said trustees are hereby authorized and instructed to sell

11 said premises in Luray, Virginia, and to re-invest the proceeds in such other property, for a home for my said daughter, as she may designate; and for this purpose they may appropriate the additional sum of one thousand dollars from any money in their hands, not otherwise appropriated by the terms of this will; said property when so purchased to be held under all the stipulations and limitations as are herein provided regarding the said premises in Luray, Virginia, provided, that upon the death of my said daughter the title to said premises at Luray, Virginia, or the property for which same may have been exchanged as above provided, shall be and is hereby vested in my said Vertner grandchildren equally.

Item 6. I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 "M" street, N. W., Washington, D. C., but in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said sum of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof.

Item 7. It is my desire and my trustees are hereby authorized

and instructed to let, lease and rent all the real property described in item 3 hereof, and out of the income derived therefrom, except
No.
that derived from the house known as v 611 M street, N. W.," which shall be paid to my niece as provided in item 6 hereof, to pay (*a*) all taxes assessed against the same, (*b*) the costs of all necessary repairs thereto, (*c*) all costs of insurance, and (*d*) the sum of ninety dollars monthly to my daughter, Constance K. Vertner, as provided in item 5 hereof; the residue, or a sufficient amount thereof, after making the payment of the said ninety dollars monthly, shall be applied for the support, education and maintenance of my beloved grandchildren, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, they being the children of my said daughter, Constance K. Vertner; it being my desire and intention, by the provisions of this will, to provide for the support and education of my said grand-
said
children so that their v mother shall not be taxed for any portion thereof, not even for their clothing.

This item is subject, however, to the provision that upon the said
full
Lillie K. Vertner attaining the v age of nineteen years, the fee simple title to said vacant lot on Twentieth street, as described in item 3 hereof, shall be, and is hereby vested in her, and free from any
12 control or interference by said trustees, and provided further that if I shall during my lifetime improve said vacant lot, then in that event the fee simple title to said vacant lot shall not vest in my said granddaughter, Lillie K. Vertner, until the first day of January, 1928, but upon her arrival at the age of nineteen years, the net rents and revenues derived by said trustees from said lot shall be paid over to said Lillie K. Vertner, to be used by (Signed) Thomas Kearney) her as her own individual property.

Item 8. It is my desire and my said trustees are hereby authorized and instructed that, upon the death of my said niece, Gabriella
No.
K. Jordan, the fee simple title to the house and lot, v 611 M street, N. W., Washington, D. C., shall be and is hereby vested in my grand son, Thomas K. Vertner, provided, that should my said niece die before the 1st day of January, 1928, then in that event, said Thomas K. Vertner shall only receive the net rents and revenues derived by my trustees therefrom, and provided further that, should my said niece, die before my said grand son shall have attained the age of twenty-two years, then, from the date of the death of my niece, until the said Thomas K. Vertner shall have arrived at the age of
derived
twenty-two years the rents and revenues v from said lot shall be disposed of in the same manner as provided in item 7 hereof in regard to the rents and revenues derived from other property mentioned therein, except the vacant lot on Twentieth street, N. W.

It is my desire, and my trustees and their successors in trust are hereby authorized and instructed to open and keep open a private passageway from the public alley to the rear of the house and

lot known as No. 613 M street, and the alley in the rear of said eight houses on F street, N. W., is also to be kept open perpetually, and my said trustees are hereby authorized and instructed to keep the same open; said alley is (3) three feet wide, opens into Twentieth street and runs far enough back to give a rear outlet to each of said houses on F street, N. W., and lies between said eight houses and the vacant lot in the rear thereof which fronts on Twentieth street and runs along the outside of the rear fence to said F street house.

Item 9. On the thirtieth day of May, 1890, I entered into a written contract of co-partnership with one Asher Richardson, for the conducting of a stock ranch business on and in connection with my said ranch lands described in item 4 of this will, and reference is hereby made to the said written contract and the record thereof in the records of said county of Webb, for the terms and conditions thereof and, as there has been an extension of the same when said contract is to expire, which said extension is also in writing, reference is also hereby made to the same and the records thereof for the terms and conditions of the same. It is my desire that my executors hereinafter named shall, and they are hereby authorized and
13 instructed to in all things carry out my part of said contract with said Richardson, and after the expiration of said contract by limitation as to time or otherwise, my executors are hereby authorized and instructed to partition with said Asher Richardson all
all the property
the property v belong*ing* to said co-partnership, the same being all the personal property belonging thereto; and after such partition to sell my part thereof, either at public or private sale, after giving due notice thereof, as my said executors think for
best
the v interest of my estate; all sales thereof under one thousand dollars to be for cash, and all sales for larger amounts to be paid in not less than one third in cash, and the balance on either six or twelve months time, or divided into two payments, one payable at six and the other at twelve months from date of
or all for cash
sale, v as my said executors shall deem best, all deferred payments to be fully secured and to bear interest at the rate of ten per cent. per annum from day of sale. If in the opinion of my executors my said interest in said co-partnership property can be disposed of to a better advantage without a partition

*

then they may sell my undivided interest in such co-partnership property for cash or upon the same terms as above stated, or, if in the opinion of my executors it shall be advisable to ship said live stock or any part thereof out of the State of Texas for sale, then they are hereby authorized to so ship and to sell the same. The pro-
my
ceeds of such sale to be by v said executors disposed of as follows: 1. Set aside the amount necessary to provide*d* for the monthly allowance to Mary Cox, as provided for in item 12 hereof. 2. To pay the legacy of eight hundred dollars to my step granddaughter,

(Signed) Thomas Kearney.

Jennie R. Chamberlain, as provided for in item 11 hereof; and the balance to be disposed of as follows: viz: one-fifth (1/5) part thereof shall by my executors be paid over to my son, Edmund Kearney, if
then
living, but if not then living v to his legitimate child or children if any he leaves surviving him; but if he shall not leave any such child or children surviving him, then his said one-fifth part shall, by my executors be paid to my said trustees for the use and benefit of my said three Vertner grand children in equal portions; subject, however, to the conditions and limitations hereinafter expressed; one-fifth (1/5) to my trustees, the same to be by them held for the use of my said daughter, Constance K. Vertner, and paid over to her in yearly installments of one-fourth part thereof per year for four years; the other three-fifths shall by my said executors be paid over to my said trustees for the use and benefit of my said three Vertner grand children, subject to the conditions and limitations hereinafter expressed.

to be

Item 10. My executors hereinafter v named are hereby
14 instructed to sell my said ranch lands described in subdivision A of item 4 of this will, provided said sale shall not take place until after the termination of my said contract with said Asher Richardson, as mentioned in item 9 of this will. It is my desire and my executors are hereby instructed to sell said ranch
to the to
lands at private sale and on such terms as v price as v them may seem best, and they are hereby fully authorized and instructed to execute and deliver proper deed or deeds of conveyance of same to the purchaser or purchasers thereof; and they are further authorized to sell said ranch lands either in one tract or body, or in two separate tracts. If sold in two separate tracts they shall make the road leading from Laredo to Eagle Pass the dividing line between said two tracts. If sold in one body or tract the purchaser or purchasers thereof shall be required to pay not less than one-third of the purchase price in cash upon the execution and delivery of the deed or deeds
and
thereof; all deferred payments of purchase price, whenever v however sold, shall be secured by a vendors' lien on the premises sold, and shall be payable at such times and bear such rate of
to be
interest as shall to my executors appear v for the best interest of the legatees who are to receive the proceeds of said sale; provided that said ranch lands shall not be sold until my youngest grandson, viz., Thomas K. Vertner, shall have arrived at the age of twenty-two years, unless my said executors shall, upon the
at least
sale of the same, be able to realize v the sum of $2.50 per acre therefor. The proceeds of the sale or sales of my said ranch lands shall be collected by my said executors hereinafter named, and by them paid and disposed of as follows; viz.: The one-
*
fifth part thereof shall be immediately paid over to my said son,

* (Signed) Thomas Kearney.

Edmund Kearney, if living, but in case, he shall be dead at the time the same or any part thereof is collected and shall leave surviving him a legitimate child or children, then the part that should have gone to my said son shall by my said executors be paid over to such surviving child or children, provided that if my said son shall die without leaving surviving child or children and before he said
shall have received v one-fifth part of the proceeds arising from the sale of said ranch lands, or any portion of said one-fifth part, then, in that event said portion remaining unpaid to him shall by my executors be paid over to my trustees for the use and benefit of my said three Vertner grand children, subject to the conditions and limitations hereinafter expressed. (2) Another one-fifth part thereof shall by my executors be paid over to said trustees or their successors in trust, who shall, if my daughter Constance K.
15 Vertner be then living, immediately pay the same over to her, without any limitation or condition whatever; provided that if my said daughter shall have died before said one-fifth part shall said
be received by her, as aforesaid, the same shall by my v trustees be held for the use and benefit of my said three Vertner grand children under the conditions and limitations hereinafter prescribed; (3) The other three-fifths (3/5) part of the proceeds arising from the sale of said ranch lands shall be by my said executors paid over to my said trustees for the use and benefit of my said three Vertner grandchildren, under the conditions and limitations hereinafter expressed; until such sale of my ranch lands my executors are hereby authorized and instructed to rent the same, either all together, or in two separate tracts, and if in two separate tracts, then, the same to be divided by said Laredo and Eagle Pass road, and on such terms as to them may seem for the best interest of my legatees herein. If rented for a term of years the same to be in writing and including the clause permitting my said executors to terminate said term in case of sale by giving six months notice of their determination so to do. The proceeds arising from the renting of said ranch lands shall be disposed of by my said executors to the same persons and in the same manner as is above provided for the disposition of the proceeds of the sale of said lands.

Item 11. I hereby give and bequeath to my said step-grand daughter, Jennie R. Chamberlain, wife of Norman Chamberlain of Natchez, Mississippi, the sum of eight hundred dollars ($800), the same to be paid by said executors to her out of any available cash

that I may have in bank in the State of Texas or from a sale of my interest in the personal property on my said Galvan ranch in Webb county, Texas; provided, that in case the said Jennie R. Chamberlain shall die before I do, then this legacy to her shall be null and void.

Item 12. It is my desire, and my executors are hereby instructed to appropriate from and out of any moneys which may come into their hands from any money which I may leave in any bank or banks in the State of Texas from the sale or rent of any property situated in said State of Texas as in this will provided sufficient sums to provide for the payment (1) of the sum if eight hundred (800) dollars to Jennie R. Chamberlain, as is provided in the foregoing item 11 hereof; v such sum as will, when placed at interest, be sufficient to provide an income from the interest to make a fund of eight (8) dollars per month,

(Signed) Thomas Kearney.

to be paid monthly to my old colored servant, Mary Cox, now in San Antonio, Texas, such monthly payments to be kept up so long as she may live. I suggest said monthly payments to be delivered to Mr. John Newton, of the firm of Newton and Weller of San Antonio, or his wife, who are friends of said Mary Cox, and who, I feel sure, will pay same over to said Mary, with such advice regarding its expenditure as will be for the material benefit of said old servant. This part, however, is only intended as a suggestion. For the purpose of providing such an income my executors are hereby authorized and instructed to appropriate the sum of six hundred (600) dollars out of any money coming into their hands as aforesaid, out of which they shall make said monthly payments provided that this last clause is only intended to provide for such monthly allowance until such time as said other sum may be placed at interest, and said allowance can be derived therefrom.

Item 13. I have, by deed of trust dated San Antonio, Texas, August 19, 1892, conveyed to William Campbell, an insurance agent, residing in San Antonio, Texas, v as trustee for the benefit of Mrs. Lottie Richie, the rents and profits of my house No. 215 Obraja street, and the lots appertaining thereto in the city of San Antonio, Texas; the said rents and profits to be paid over to her, the said Mrs. Lottie Richie, by said trustee monthly as collected during the full lifetime of said Mrs. Lottie Richie, and at her death said trustee is to at once convey said house and lots to my son, Edmund Kearney in fee simple, or if said Campbell is then dead, then the conveyance to my son is to be made by his successor, and in case both he and his successor shall die, without making said conveyance to my son, then the title to said house and lot- shall be vested in my son by virtue hereof as soon as Mrs. Lottie Richie dies. It is also provided in said deed of trust that in the event of the death of the trustee before the decease of Mrs. Lottie Richie, or in the event that he should be in any cause unable to act as such trustee, then said beneficiary is

authorized to select some friend to act as such trustee, and petition the district court of Bexar county, Texas, to appoint the party selected as trustee. This deed of trust, although duly executed, has never been recorded by the trustee, William Campbell, and may become lost or destroyed, and this provision of my will in regard thereto is intended to confirm said deed of trust; but said [deed][* of trust is not to take effect until after my death, and the true intent of the same and of this item of my will is to give the use of the rents of said property after my death to said Mrs. Lottie Richie during her natural life, if she survives me, with a remainder in fee after her death to my son, Edmund Kearney.,

17 Item 14. Having full faith in the integrity and business ability of Daniel Milmo and J. O. Nicholson of nominate and Laredo, Webb county, Texas, I hereby v appoint them and each of them, as executors of all the provisions of this will which apply to my estate in the State of Texas. I desire and that instruct v no security be required of them or either of them. I desire and direct that no other action be had in the county or probate courts of Texas in relation to the settlement of my estate in the State of Texas, than the probating and recording of this my last will and testament and return of an inventory and appraisement of the property belonging to my estate that is situated in the State of Texas, together with a list of claims against my estate. It is my desire, and I hereby direct that in case of the death of either one of my executors, or in case of the inability, failure or refusal of either one of them to act as such executor, then the survivor, in case of the death of one, or the one acting in case of the inability, failure or refusal of the other one to act is hereby vested with all the rights, powers and authority which under any provision of this will is conferred upon both of said executors.

(Signed) Thomas Kearney.

Item 15. Whenever the word "trustees" is used in this will the same shall be construed to refer to the said Leroy M. Taylor and E. S. Drake and their or either of their successors in trust, as hereinafter provided, and wherever the word "executors" is used in this will, the same shall be construed to refer to the said Daniel Milmo and J. O. Nicholson, or the survivor of them, or the one acting as trustee in case of the inability, failure or refusal of either one to act as such executor. It being my desire and intention to confine the duties, authorities and powers of my said trustees to the property situate in the State of Virginia and Washington, D. C., and to the remaining proceeds of that portion of my estate situated in the State of Texas, which under the provisions of this will, are by my said executors to be paid over to the said trustees; and that the duties, powers, and v authority and powers of my said executors shall only extend to and over that portion of my estate situated in the State of Texas.

[*Erased with pencil in copy.]

Item 16. If I shall leave in bank or banks in the State of Texas at the time of my decease any money, then the same is hereby given to my executors in trust for the following purposes, viz.: (1) to pay all costs of my last sickness and funeral expenses, (2) to pay all expenses of the probating, recording of this will, together with the costs of making and returning and recording an inventory and appraisement of all my property in the State of Texas, (3) provide for the payment of the monthly allowance to Mary Cox, and the payment of the legacy to Jennie R. Chamberlain. The residue of such money so left in bank or banks, if any, shall by my executors
18 be paid over to my said trustees, and by them placed in funds, out of which they, the said trustees, are to make the payment of ninety dollars monthly to my daughter, Constance, and to provide for the payment for the support, education and maintenance of my said three Vertner grand children.

Item 17. In case of the destruction of any of the improvements of the Washington, D. C. property described in item (3) three hereof by fire, the insurance money received thereon is to be by my trustees applied to the rebuilding of the improvements so destroyed. And if said insurance money is not sufficient in amount to rebuild the same, then there shall in addition to said insurance the money be appropriated from v money received from rents of balance of said property, or from any money on hand which may have accumulated from such rents, or from any other source, and which may not be necessary for the support, and maintenance of my daughter, Constance, and the support, maintenance and education of my said three grand children, as hereinbefore provided, a sufficient amount to rebuild said destroyed improvements.

Item 18. Having full faith in the honesty and integrity of the the said Leroy M. Taylor and v said E. S. Drake, as aforeit is my desire said v that they act as trustees as is provided in this my last will and testament, and that as such trustees to carry out all and the provisions of the same as is herein provided; v I hereby direct that they nor either of them shall be required to give any

(Signed) Thomas Kearney.

bond as such trustees, and it is my desire that the probate court of the District of Columbia nor of any other State shall require any bond of my said trustees, and that such courts take no further action in regard to my said estate or in regard to my said trustees than to admit this my last will and testament to probate and the receiving of an inventory and appraisement of the property belonging to my estate, and recording the same, and in the case of the death of either of my said trustees then the survivor of them shall have, and is hereby vested with all the rights, privileges, authority and power, including the exemption v giving bond, as is from

hereby conferred upon both of them, and this applies to the survivor one at the time of my death. In case either v of them should die before I do, or in case either of my said trustees shall die before the trust and duties herein conferred upon them shall have been fully performed and discharged, or in case either one of them shall fail, refuse or become from any cause unable to act as such trustee before the said trust shall have been performed as aforesaid, then it is my desire that the surviving trustee in case of the death of one of them, or the acting trustees in case either one shall fail, refuse or 19 become unable to act as such trustee, then in such event and in order to guard against the possible contingency of their coming a time when there will not be any trustee to carry out the said trust and duties, I direct that the said surviving or acting trustee together and the judge of the probate court of the District of Columbia shall v and jointly appoint some one of the Incorporated Trust Company of the the said District of Columbia, which by the laws and v terms of its charter may be authorized to accept and perform such trusts as are herein the provided for, to act as v successor in trust of said surviving or acting trustee, and in case of the appointment of any such company as such trustee, then all the rights, powers and duties herein conferred on the trustees herein named are hereby conferred on said company; provided that so any such company which may be v appointed shall not enter upon the authorities performance of said trust powers and v nor have any authority as or acting such trustee during the lifetime of such surviving v trustee, provided further, however, that if from any cause, such surviving or acting to perform trustee shall before his death become unable or incapacitated v the duties herein conferred on him as trustee, then said trust company may and is hereby fully empowered and instructed to take charge of the trust property herein conveyed to my said trustees, and my to do and perform all the powers herein conferred upon v said trustees. The appointment of said company as successor in trust shall be upon the petition of said surviving or acting trustee to said probate court, provided that should both of my said trustees die or fail or refuse or become unable to perform the duties herein conferred upon them before the appointment of any such company as said successor in trust, then, in such event the petition to said probate court shall be made by said executor or the survivor or the one acting as such executor as the case may be.

Item 19. It is my desire and I hereby direct that any property, real, personal or mixed v situated in the State of Virginia of which I may die the owner, either legally or equitably and not especially mentioned in this will, I hereby give, devise and bequeath to my said daughter, Constance K. Vertner Any other such property situated in the city of Washington, D. C. and not disposed of by any of the provisions of this will is hereby devised to my said trustees for the use and benefit of my said daughter and her said three children, provided that if same shall consist of money the same shall be held by said trustees as a common fund, which in case the rents and revenues derived from the Washington, D. C. property are not sufficient after paying the taxes, costs of insurance and repairs, including the taxes, costs of insurance and repairs on the house at Luray, Virginia, to provide for the payment of (90) ninety dollars per month to my daughter, Constance K. Vertner, as hereinbefore provided, and for the support, education and maintenance of my said three Vertner grand children, as hereinbefore provided, may be drawn on for any or all said purposes. If the same shall consist of personal property other than money the same shall by my trustees be converted into money and the said money shall be used in the same way as the fund last above mentioned. If same shall consist of real estate, it shall be held until the year 1928, under the same conditions and limitations as the real estate hereinbefore devised to the use of my said three Vertner grandchildren, which they shall not come into v possession and control of until said year 1928, as hereinafter provided.

(Signed) Thomas Kearney.

Item 20. It is my desire and my trustees are hereby instructed to keep all the houses herein entrusted to them insured and in repair; to keep all taxes due or to become due thereon paid, and in case of the destruction or injury of them or any of them, to rebuild or repair them in accordance with the instructions in item 17 hereof.

Item 21. For fear that there may be some difficulty in construing the different provisions of this [will],* relating to the moneys which may come into the hands of the trustees herein named, I desire to say that it is my intention that all the moneys arising from the rents of the Washington, D. C. property, except that which is to go to Gabriella K. Jordon, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2) of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years re-

[*Word enclosed in brackets erased in copy.]

be
spectively. To this fund is to v added any money that I may leave in bank in Washington, D. C.; also the parts and portions which my said three grand children are to receive from my estate in the State of Texas, as hereinbefore provided, which said parts and portions are to be held together with the fund hereinbefore in this item mentioned until Thomas K. Vertner, the youngest of my said grand children, shall have arrived at the
my
age of twenty-two years, provided that when v said grand daughter, Lillie K. Vertner, shall arrive at the age of nineteen years she shall have from said fund a monthly allowance of (50) fifty dollars per month, in addition to the cost of her support and maintenance until said Thomas K. Vertner shall have arrived at the said age of twenty-two, when there shall be

* * * (Signed) Thomas Kearney.

a division made between my said three grand children
21 of all money remaining from my estate in Texas which, under the terms of this will, is to be paid to the trustees for
the
the use and benefit of my said three grand children; they, v said grand children to have the same delivered over to them to share and share alike; and in addition thereto they shall receive the net rents arising from the respective houses and lots hereinafter devised to
said
them respectively, provided that said rents nor their v portion from my said estate in Texas shall be paid over to them during the life-
said
time of their v said mother, Constance K. Vertner, unless there shall be a fund on hand after having so diverted said rents and revenues and the said portions derived from my estate in Texas, sufficient to provide for the payment of the said (90) ninety dollars per month to my said daughter, Constance K. Vertner; but if such provision can be made for the payment of said monthly allowance to my said daughter out of a part only of said funds last above mentioned, then my trustees are instructed to make such provision and to pay balance of said funds over to my said three grandchildren, as hereinbefore in this item provided. On the first day of January, 1928, the title and ownership of the Washington, D. C., property not hereinbefore disposed of, shall be and is hereby vested as follows; viz.: In Lillie K. Vertner the said lot and improvements thereon
six hundred and thirteen,
known as No. (613) v "M" street, N. W.; also houses and lots known as No. (2000) two thousand, (2002) two thousand and two, on F street, N. W.; in Edmund K. Vertner the said houses and lots known as (2010) two thousand and ten, (2012) two thousand and twelve and (2014) two thousand and fourteen on said F street,

the said
N. W.; in Thomas K. Vertner v houses and lots known as (2004) two thousand and four, (2006) two thousand and six, and (2008) two thousand and eight on said F street, N. W.; provided that if my said daughter, Constance K. Vertner shall be living on the first day of January, 1928, then in such event said titles shall not vest in my said grandchildren on said day, and not until the death of their said mother, but upon her death, privided she does not die
said
until after the first day of January, 1928, said title shall immediately vest as above provided in this item. None of the provisions of this will shall be construed so as to prevent said trustees from placing any surplus funds which may remain in their pos-
22 session, after having provided for the payments of the monthly legacies in this will mentioned, in a condition to earn an income in the nature of interest, provided that
any
such surplus must not be invested in v railroad stocks or bonds or other like corporate securities. If the same shall be invested in bonds of any kind, then such bond shall be national, State or municipal. If loaned at interest on real estate security,
such
then v security shall consist of improved business property of value at least double the amount of money loaned thereon, provided, however, that such funds may at the discretion of the trustees be kept in bank on time deposit bearing interest.

Item 22. I direct that my executors be, and they are hereby authorized to deduct from all moneys passing through their

* * (Signed) Thomas Kearney.

hands the usual compensation allowed by the laws of the State of Texas to executors and administrators. I also authorize to deduct from the moneys passing through their hands as is allowed similar trustees by the laws of the District of Columbia, provided, that if my company shall be appointed trustee as provided in item 18 hereof, then such trust company shall only be allowed such compensation as is usually charged by such company or other like company for such business, which said compensation shall be fixed in the order of appointment to be made by the probate court of the District of Columbia, as hereinbefore provided.

In testimony whereof, I, Thomas Kearney, hereunto affix and subscribe my name to this my last will and testament, this fourth day of June, A. D. 1896.

(Signed) THOMAS KEARNEY.

Signed, published and delivered by the said Thomas Kearney as and for his last will and testament in the presence of the undersigned, who at his request and in his presence, and in the presence

of each other, subscribe our names hereto this, the fourth day of June, A. D., 1896.

(Signed) FRANK B. EARNEST.
(Signed) JAMES B. HAYNES.
(Signed) A. V. WOODMAN.

Answer of Constance K. Vertner.

Filed May 15, 1900. J. R. Young, Clerk.

Separate answer of the defendant Constance K. Vertner.

This defendant admits all the matters and things averred in the bill of complaint in the above entitled cause.

Further answering said bill of complaint this defendant
23 states that she is advised and so avers, that the last will and testament of her father, the late Thomas Kearney, is void and of no effect to dispose of the real estate situated and lying within the District of Columbia for the reason that the provisions of said will relating to said real estate attempt to create such an estate as is contrary to the law forbidding the creation of perpetuities.

Further answering said bill this defendant states that said Thomas Kearney departed this life on or about the 4th day of July, 1896, leaving this defendant and her brother, Edmund Kearney, as his sole heirs at law. Edmund Kearney departed this life on or about the 4th day of June, 1898, leaving a widow, Mrs. Mary B. Kearney and this defendant, his sister, as his sole heir- at law. That said Edmund Kearney left a last will and testament, a certified copy of which is filed herewith, marked C. K. V. No. 1, and prayed to be read as a part of this bill, but this defendant is advised that said will is not in proper form to pass the title to real estate within the District of Columbia.

This defendant joins in the prayer of the bill of complaint for a decree of this honorable court declaring the proper construction of the last will and testament of Thomas Kearney, deceased, so far as the same relates to real estate lying within the District of Columbia.

STATE OF MARYLAND, *Washington County*, *ss:*

I do solemnly swear that I have read the above answer by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated on information and belief I believe to be true.

CONSTANCE KEARNY VERTNER.

Subscribed and sworn to before me this 14th. day of April 1900.

J. W. COOK,
Notary Public.

[SEAL.]

EXHIBIT "C. K. V. No. 1."

Filed May 15, 1900.

Last Will and Testament of Edmund Kearney.

LAREDO, TEXAS, *June 2nd*, 1898.

In the name of God, amen.

I the undersigned Edmund Kearney of Jefferson county, Mississippi, being of sound and disposing mind do make this my last will and testament. I give to our adopted niece Mayken B. Pierce, the sum of five hundred dollars, the sum to be held in trust by
24 my dear wife Mary B. Kearney and the same to be paid to said Mayken B. Pierce at such time or times as she may deem it best for the good interest of our adopted niece.

The remainder of my estate both real and personal, situated in the State of Texas or elsewhere or any property real personal or mixed which may hereafter accrue to my estate, I give and bequeath to my dearly beloved wife Mary Brandon Kearney, whom I hereby appoint sole executrix of this my last will and testament, I hereby cancel, annul & set aside any will or wills previously made by me.

In witness of all above written I hereunto set my name and seal this 2d June, 1898, in Laredo, Texas.

EDMUND KEARNY. [SEAL.]

Witness:

A. W. WILCOX.

Answer of Gabrielle K. Jordan.

Filed May 15, 1900.

Separate answer of the defendant Gabrielle K. Jordan.

This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth, she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in said bill of complaint to be true.

GABRIELLE K. JORDAN.

Verification waived:

THOMAS P. WOODWARD,

Solicitor for Complainant.

Witness:

LYBRAND SILL.

MELVINA SILL.

Memorandum.

May 22, 1900.—Guardian *ad litem* appointed for Lillie K., Edmund K. and Thomas K. Vertner, who on same day filed formal answer.

Memorandum.

May 23, 1900.—Replication joining issue and calendaring cause for hearing on bill and answers.

25 *Decree.*

Filed June 27, 1900.

This cause having been calendared, was submitted on the pleadings filed therein and duly considered, it is, by the court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuties and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that said provisions of said will are deemed and held to be void and of no effect and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs at law.

JOB BARNARD, *Justice.*

Memoranda.

(3) October 29, 1901.—Subpœna to all defendants issued and returned December 3, 1901, as to all "Not to be found."

(4) April 7, 1902.—Alias subpœna to all defendants issued and returned May 5, 1902, endorsed "Summoned defendant Leroy M. Taylor personally April 7th, 1902. Aulick Palmer, marshal. No copies for other defendants."

Memoranda.

(6) August 17, 1903.—Affidavits as to non-residence of all defendants except Taylor filed.

(7) August 17, 1903.—Order of court requiring all defendants to appear except defendant Taylor passed.

(8) September 25, 1903.—Proof of publication of order of August 17, 1903, filed.

(9) October 5, 1903.—John J. Hemphill appointed guardian *ad litem* for infant defendants Edmund K. and Thomas K. Vertner.

(11) October 7, 1903.—Affidavit of solicitor as to mailing notices to all defendants except Drake and Taylor filed.

(12) October 31, 1903.—Motion by defendant Drake to strike out

sub. paragraph ("b") of paragraph 1 of the 9th. paragraph of the bill of complaint as being scandalous, impertinent and immaterial.

(13) November 5, 1903.—Sub. paragraph ("b") of paragraph 1 of the 9th paragraph of the bill of complaint stricken out.

26

(14) *Demurrer.*

Filed November 5, 1903.

The demurrer of Constance K. Vertner and Lilly K. Vertner to the bill of complaint of Gabriella K. Jordan.

To the supreme court of the District of Columbia, holding an equity court:

These defendants by protestation not confessing or a-knowledging all, or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, do*es* demur thereto and for cause of such demurrer show*s:*

That the said complainant has not in and by her said bill stated such a case as does or ought to entitle her to the interference of this honorable court or to the relief prayed for, from or against *this* defendant-.

Wherefore and for divers other good causes of demur- appearing in said bill, these defendants do demur thereto and to all the matters and things therein contained, and pray judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill, and that they may be hence dismissed with their costs and charges, in this behalf most wrongfully sustained.

JNO. J. HEMPHILL,
Solicitor for Defendants Constance K. and Lilly K. Vertner.

(15) *Demurrer of Elijah S. Drake.*

Filed November 5, 1903.

The demurrer of Elijah S. Drake, trustee, to the bill of complaint of Gabriella K. Jordan.

To the supreme court of the District of Columbia, holding an equity court:

This defendant by protestation not confessing or acknowledging all, or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, does demur thereto and for cause of such demurrer shows:

That the said complainant has not in and by her said bill stated such a case as does or ought to entitle her to the interference of this honorable court or to the relief prayed for, from or against this defendant.

27 Wherefore and for divers other good causes of demurappearing in said bill, this defendant does demur thereto and to all the matters and things therein contained, and prays judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and that he may be hence dismissed with his costs and charges, in this behalf most wrongfully sustained.

THOMAS P. WOODWARD,
W. MOSBY WILLIAMS,
Solicitors for Defendant Elijah S. Drake, Trustee.

(16) *Opinion of Justice Anderson.*

Filed May 9, 1904.

Opinion delivered by Anderson, J., April 20, 1904.

This is a bill of review filed in this court on October 29th, 1901, by Gabriella K. Jordan against Elijah S. Drake and Leroy M. Taylor, trustees under the last will and testament of Thomas Kearney, deceased, Constance K. Vertner, his daughter, and Lillie K. Vertner, Edmund K. Vertner, and Thomas K. Vertner, the infant children of Constance K. Vertner, praying that the final decree passed by the supreme court of the District of Columbia on the 27th day of June, 1900, in equity cause No. 21,422 may be reviewed and set aside in so far as the same affects the right of the complainant Gabriella K. Jordan, to take under the sixth item of said will, and to remain in the undisturbed enjoyment of the rents and revenues derived from certain real estate situated in the District of Columbia, as therein provided.

To this bill demurrers were interposed by certain of the defendants, and after full argument, the points thus raised were submitted to the court for its decision.

The case presents the following facts: Dr. Thomas Kearney of San Antonio, Texas, died July 5th, 1896, possessed of a large estate, consisting of real and personal property in this city, and in the States of Virginia and Texas. By the terms of his last will and testament, his Washington real estate was devised to the defendants Drake and Taylor, trustees, to hold in trust for the purposes therein named, until the year 1928. A copy of his will, dated June 4th, 1896, was duly filed and recorded in the office of the register of wills for the District of Columbia November 6th, 1897, together with the renunciation of Dr. Leroy M. Taylor, one of said trustees and a defendant in this cause.

By the terms of the will it was provided that no further steps should be taken in the probate court of the District of Columbia than the filing of said will and an inventory of his Washington property.

28 On the 15th day of May, 1900, the defendant Elijah S. Drake, of Fort Gibson, Mississippi, the remaining trustee under said will of Thomas Kearney, styling himself as such trustee,

filed his bill in equity in the supreme court of the District of Columbia against his co-trustee, Leroy M. Taylor, and Constance K. Vertner, and her infant children, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, and the complainant to this bill—Gabriella K. Jordan, and filed therewith a copy of said will as an exhibit, and setting forth therein certain provisions of the will, relating to and disposing of certain real estate and rents, revenues and profits arising therefrom situated in the city of Washington, District of Columbia. Amongst other provisions so set forth in said bill are the following:

(Sets out items 6, 7 and 8 of will of Thomas Kearney.)

The said Drake, trustee, in and by the sixth paragraph of said bill averred as follows:

"6th. Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia and your complainant is advised that the said provisions are void because they attempt to create a perpetuity."

And by the third prayer of his said bill he prayed as follows:

"That by a decree of this honorable court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised."

And by the fourth prayer he prayed "that he shall have such other and further relief as the nature of the case shall require."

The complainant, Constance K. Vertner, one of the defendants to the present bill, filed her separate answer to the original bill to the effect that she admitted all the matters and things therein averred and further that she was advised and therefore averred that the will of her father, Thomas Kearney, deceased, was void and of no effect to dispose of the real estate situated in the District of Columbia for the reason that the provision of said will relating to said real estate attempted to create such an estate as is contrary to the law, creating perpetuities; that she and her brother, Edmund Kearney, were the sole heirs at law of the said Thomas Kearney; that said Edmund Kearney died on the 4th day of June, 1898, leaving a widow, Mary B. Kearney, and that she, the said Constance K. Vertner, was his sole heir at law; that the said Edmund Kearney left a last will and testament, a copy of which was filed with her said answer, and prayed to be read as a part thereof, but that she was advised that the said will of Edmund Kearney is not in proper form to pass the title to real estate in the District of Columbia, and she joined in the prayer of the bill for a decree declaring the proper construction of said will of Thomas Kearney, deceased, so far as it relates to real estate in the District of Columbia. The infant defendants, children of Mrs.

Vertner, and grandchildren of the testator, answered by
29 their guardian *ad litem*. Leroy M. Taylor, the co-trustee of

Drake, filed his answer in said cause, stating in substance and effect that he had renounced and declined to act under the will of Thomas Kearney, deceased, and thereby renewed said renunciation and declination.

To this bill the complainant, Gabriella K. Jordan in her proper person filed her separate answer as follows:

"This defendant being advised that the bill of complaint herein involved only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in the said bill of complaint to be true."

Issue was joined, but *no evidence was taken or testimony produced before the court* other than the copy of the will filed as an exhibit to the bill. Nor does there seem to have been any opposing counsel, the cause being submitted to the court on bill and answer, and the brief of the complainant's solicitor.

Thereupon, on June 27th, 1900, the court adjudged, ordered and decreed as follows:

"This cause having been calendared was submitted on the pleadings filed therein and duly considered, it is, by the court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed, that said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs at law. Job Barnard, justice."

No appeal was taken from said decree by any of the parties to said cause. Upon the filing of this decree the trustee Drake discontinued paying the complainant, Miss Jordan, the annuity of $40.00 per month, as provided by the sixth item of said will on the ground that the real estate in the District of Columbia charged with the payment thereof had been taken from his control by said decree, and that said legacy was no longer enforceable so far as he was concerned. Thereupon on October 29th, 1901, Gabriella K. Jordan, one of the defendants to said original bill, filed her bill of review in this court, naming the complainant in the original suit, E. S. Drake, trustee, and Constance K. Vertner, and her three children, already named, as defendants. She avers in her will that she has been greatly injured and aggrieved by said final decree, and by the construction of said will by the court, the effect whereof has been to deprive her of her said property devised to her for life by the sixth item of the last will and testament of Thomas Kearney, deceased. She therefore avers and insists that said final decree is erroneous and ought to be reviewed, reversed and set aside for errors and imperfections apparent on the face of the decree, and of the record and proceedings in said cause, averring that the decree, amongst other things, was erroneous in the following particulars:

1st. In decreeing relief upon said bill in the absence of proper and

necessary parties to the suit, neither the said Edmund Kearney, if he were living, or if he were dead, his personal representatives having been made a party; nor was any proof made that he died without issue him surviving; or that the said Constance K. Vertner was his sole heir at law; or that he died intestate.

2nd. In decreeing adversely to the complainant that the provisions of said will, so far as the same attempted to dispose of lands and tenements, within the District of Columbia, are deemed and held to be in violation of the law prohibiting the creation of perpetuities and decreeing that as to such lands and premises said Thomas Kearney died intestate, and that the same descended to his heirs at law.

3rd. That by reason of said decree she has been deprived of the annuity devised to her in the sixth item of said will, whereas she avers said devise is a perfectly legal and valid gift, being for the life only of the complainant, and not in contravention of the law prohibiting perpetuities, nor contrary to any statute, and that the said Thomas Kearney did not die intestate.

Wherefore she says that inasmuch as such errors appear in the body of said decree and in the record of the proceedings in said cause and there is no proof upon which to base such a decree deeming and holding that the testamentary disposition in her favor mentioned in and declared in the sixth item of said will to be in violation of the law prohibiting the creation of perpetuities, or contrary to the statute in such cases made and provided, as to such real estate situated in the District of Columbia, and no proof upon which to base any decree deeming and holding the said provision of said will to be void and of no effect, or that the said testator, Thomas Kearney, died intestate as to said real estate, or that the same descended to his heirs at law, as set forth in said final decree, she prays that said decree may be reversed and set aside, and that she be permitted to remain in the undisturbed enjoyment of the rents and revenues derived from said real estate as provided in the sixth item of said will.

She also prayed for general relief.

All of the defendants being served entered their appearance. The infant defendants, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, by their guardians *ad litem*, and the defendants, E. S. Drake, trustee, and Constance K. Vertner, by their respective attorneys, filed their demurrers to said bill, which are now before the court for its disposition.

31 I.

The first question raised by the demurrers to the bill is, that the complainant has been guilty of laches in filing the same, and that, therefore, this bill should be dismissed.

Equity rule 88, relating to the filing of bills of review provides that "no bill of review shall be filed unless within two years *after entry of decree or order.*" The decree now under review was made June 27th, 1900, and although the *bill* was filed within less than *two years* after the entry of such decree, it is claimed that because

the order of publication was not made until August, 1903, some fourteen months after complainant's right to file her bill of review had elapsed, she has thus been guilty of such laches as defeats her right in equity to proceed in this cause.

The decree as stated was passed June 27th, 1900. The bill of review was filed October 29th, 1901, or within fourteen months after the passage of the decree. A subpœna to answer was issued October 29th, 1901, and was returned *nulla bona* December 3rd; an alias subpœna to answer was thereupon issued April 7th, 1902, which was returned May 5th, following, as served on the defendant, Taylor. The answer of Taylor was filed June 3rd, 1902, which was within two years from the passage of the decree. August 17th, 1903, an affidavit of non-residence was filed, and on the same day an order for appearance and publication was passed by the court, which was some three years and two months after the date of the decree.

The rule in equity is that "where a bill of review is filed, process should be taken out as in ordinary cases." Fletcher Eq. Pl. & Pr., sec. 941.

"The appearance of the defendant is enforced in the same manner as on an original bill. The case proceeds upon such bill as an original bill." 2nd. Daniell's Chan. Pl. & Pr., 4th ed. 1574.

In the case of Webb *v.* Pell, 1 Paige (N. Y.) 564, it was held that "where a subpœna was taken out upon a bill of review, and a *bona fide* attempt made to serve it, it was held to be a sufficient commencement of the suit, although the subpœna was not, in fact, served within the time allowed by law for appealing from the decree."

In view of the fact that the bill itself was filed within the two years prescribed by rule 88 of this court, just cited, and that the subpœna to answer was issued on the same day, and upon its return an *alias* subpœna to answer was issued, and duly served upon one of the defendants, who filed his answer to the bill within the two years, to wit, on June 3rd, 1902, it cannot be seriously contended that because of the order of publication, to bring in the other defendants was not passed until August 17th, 1903, it was beyond the two years' limitation, and that, therefore, the proceeding was not instituted within the time prescribed. The bill itself having been filed within the time, and successive *bona fide* attempts thereafter having been made to serve the other defendants,
32 and that failing in this they were then brought in *my* publication, although such publication was beyond *the* two years' limitation, meets all the requirements of the rule.

II.

The next question presented by the demurrer is that Mrs. Mary V. Kearney, the widow of Edmund Kearney, the deceased, son of the testator, is a material party to this bill of review, and that the omission to make her a party is fatal to the bill. This contention is based upon the view that Mrs. Kearney became entitled to dower in said lot 611 M street, upon the filing of the decree of Mr. Justice Barnard, declaring the will of Thomas Kearney invalid as to such

real estate, and that the same descended to his heirs at law as if he had died intestate.

I do not think there is any force in this contention. The original bill did not make her a party and under equity rule 40 this court has full power to enter a decree saving the rights of all parties not before it, whose rights might otherwise be lost or prejudiced.

The rule as announced by Mr. Fletcher in his Equity Pleading and Practice, sec. 925, is that "All parties whose interest are to be affected by the *original decree* are necessary parties to the bill of review."

The interest of Mrs. Mary V. Kearney was in no way affected by the original decree, and therefore, under the rule just announced she is not a necessary party to the bill of review.

It was held in Corcoran *v.* Couper, 2 Del. Ch. 27 "that a bill of review lies against those who were parties to the original decree and against them only."

The true rule seems to be that failure to make a *material* party to the *original bill* a party to the bill of review is ground for demurrer, but where such person is not a *material party* to the *original bill* a demurrer does not lie. In any event in the disposition I am about to make of these demurrers, the interests of Mrs. Kearney, no matter what they may be, will be in no wise affected, and, therefore, she is not a material party to this proceeding.

III.

The demurrers filed by these defendants, of course, admit all the averments of the bill that are well pleaded, and hence they admit the execution and terms of the will, and the decree of the court as therein stated, but for cause of demurrer says that the complainant has not in and by her said bill stated such a case as entitles her to the interference of this court, or to the relief prayed for. In considering the construction to be put upon this will two general questions are presented:

First. Whether in the will of Thomas Kearney, deceased, his real estate in the city of Washington was so devised as to be contrary to the law creating perpetuities.

33 Second. If so, what effect, if any, have such void devises upon item 6 of the will in favor of the complainant.

It is contended on behalf of Miss Jordan, the complainant, that whether the limitation over to Thomas K. Vertner, is good or bad, the trust in favor of the complainant is not thereby affected, for the reason that it is a distinct and separate trust, standing apart from the other provisions of the will and capable of as full and complete enforcement and execution as if no other trust was thereby created. On the other hand, it is contended by the defendants that the will creates but a single estate in trust; that such estate must run without interruption until 1928; and that, therefore, the provisions of item 6 in favor of the complainant do not create a separate and distinct estate or interest in her favor.

The law in relation to perpetuities in this District at the time this will took effect is embodied in sec. 2 chap. 70 of Abert's Digest, and

is as follows: "No will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the constitution or laws of the State." (Maryland.)

By the act of Congress of Feb. 27th, 1801, this provision was made applicable to the District of Columbia.

The Supreme Court of the United States in Ould *v.* Washington Hospital, 95 U. S. 303, defined a perpetuity under this act as: "A limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years, with a fraction of a year added for the term of gestation, in cases of posthumous birth."

By the terms of the statute the person or persons by whose life or lives the period is measured must be *in esse* at the time of the creation of the interest or estate. Item 8 of the will, as above quoted, vests the fee simple title in lot 611 M street, N. W., in Thomas K. Vertner, the testator's grandson, upon the death of the complainant Miss Jordan, provided, that if she dies *before January 1st, 1928, he* shall only receive the net rents and revenues derived by the trustees therefrom, and *provided further*, that in the event the complainant dies *before Thomas K. Vertner shall have attained the age of twenty-one years, then, from the death of the complainant, until* he shall have arrived at the age of twenty-two years, the rents from said lot 611 M street, N. W., shall be disposed of in the same manner as provided in item 7 of the will in regard to rents and revenues from other property mentioned therein, except the vacant lot on 20th street N. W., viz., to the payment of taxes, insurance, repairs &c.

In interpreting this clause of the will in connection with the sixth clause, it is plain that in no event can the absolute title vest in Thomas K. Vertner before 1928, even though the complainant should die prior to that date, because if complainant dies before 1928 Thomas K. takes nothing but the rents of the lot, and if she dies before 1928, and while Thomas K. Vertner is yet under
34 twenty-one, then from the date of her death until he does attain the age of twenty-two he takes nothing, as during that period the rents go to the trustees to pay taxes, insurance and repairs, as provided in item 7. Hence it follows that this devise is limited by years and not by lives—that is, this property goes into the hands of trustees for a certain specified time, viz: until 1928, and, therefore, the power of alienation is suspended until that date. As the power of alienation therefore cannot be exercised until *at least* 1928, and not then, if Miss Jordan is still living, it follows that the devise to Thomas K. Vertner is void, as the period of alienation is beyond, or possibly beyond, a life or lives in being, and twenty-one years more.

"In applying the rule against perpetuities, the character or nature of the contingency or event upon which a future interest is limited is of no moment. The only consideration is whether this event, whatever it may be, will happen within the period prescribed by the rule." Am. & Eng. Ency. Law., 2nd. ed. vol. 22, page 707.

In determining this question it is an invariable principle that regard is to be had to possible and not merely to actual events. It is

not determined by looking back on events which have occurred, and seeing whether the estate has extended beyond the prescribed limit; but by looking forward from the time the limitation was made, and seeing whether, according to its terms, there was then a possibility that it might so extend." *Ib.* 707.

While this will is somewhat involved, it seems to be comparatively clear in so far as it relates to the purposes of the trust and the disposition of testator's real estate. By item 5 of the will the testator devises to the trustees named in the will, Leroy M. Taylor, and E. S. Drake, *"and their successors"* the real estate in question, in trust for the purposes stated, *"said trust to be continued in them and in their successors until January 1st, 1928, said trustees and their successors to have full, free and absolute possession and control of the same until the date last above mentioned, with full power to let and lease the same for said period," &c.*

By this clause of the will these trustees are clothed with the legal title to this property and the right of possession and with authority to let and lease the same until 1928, thereby in terms suspending the terms of alienation until that date, no matter what contingency may arise, and I may add even to a later date should the complainant survive that period. The same is true as to the balance of his Washington property, which by item 21 he devises to his grandchildren, Lillie K., Edmund K., and Thomas K. Vertner, the children of his daughter, Constance K. Vertner, "Provided that if my daughter, Constance K. Vertner, *shall be living on the 1st day of January, 1928, then said title shall not vest in my said grandchildren on said date, and not until the death of their said mother, but, upon her death, provided she does not die until the 1st day of January, 1928,* said title shall immediately vest as above provided in
35 said item." It follows from this that not only the vesting of the property intended for Thomas K. Vertner, but the remainder of the testator's Washington property intended for his grandchildren is postponed for a period that may be longer than a life or lives in being and twenty-one years, and *therefore,* as no power of sale is vested in the trustees, and the ultimate beneficiaries take no title until 1928, these devises are clearly void under the rule relating to perpetuities. This brings the will clearly within the rule laid down by the Court of Appeals in Cruikshank *v.* Home of the Friendless, 113 N. Y. 337, in which the court says: "A period measured by years and not by lives in being during which there will be no persons in existence by whom an absolute estate in possession can be conveyed brings an estate within the rule against the unlawful suspension of alienation." Here there is a suspension of the right of alienation for a given period, a period measured by years and not by lives in being.

"If the trustees have the power to sell, the instrument is valid, but if the power to sell is absolutely suspended for the prohibited period, it is void." Thatcher *v.* St. Andrews Church 37 Mich. 271; Belmont *v.* O'Brien, 12 N. Y. 394.

In so far, therefore, as the will of the testator undertakes to vest the fee simple title to his Washington real estate in the beneficiaries

therein named, his will is void to that extent at least, and the court was clearly right in so holding,—with the exception perhaps of the title to the vacant lot on 20th street which is to vest in Lillie K. Vertner when she attains the age of 19 years, provided if the testator improved the lot during his life-time, then the title is not to vest in her until January 1st, 1928, as provided by item 7. Nor do I understand that the complainant in this bill raises any question as to the construction put upon the testator's will in this respect, and I have only considered it in so far as it seemed to me was proper and necessary in the determination of the real question in issue between the parties arising upon these demurrers. But, admitting that the fifth clause of the will, which devises all of the Washington property to Taylor and Drake, trustees, and their successors, to hold and manage the same continuously until 1928, does create a condition where the power of alienation is by possibility suspended for a period prohibited by the law relating to perpetuities, is the sixth clause of the will, which gives to Miss Jordan the entire rents of lot 611 M street, northwest, during her natural life &c., inoperative? I think not; that provision is for her own life only, is easily separable from these void provisions of the will, and is valid as a separate and independent trust although the remainder of the trust is, and has been by Mr. Justice Barnard declared to be, void. I do not understand that by the terms of the sixth item of this will Miss Jordan takes a vested interest or estate in lot 611 M street, northwest, but, on the contrary, that she takes a mere annuity which is made a charge or incumbrance thereon, to the extent of the full rents thereof as well as a charge upon the residue of his estate to the
36 extent of $40.00 per month during her natural life, this to be paid primarily out of the rents of lot 611 M street, northwest, if sufficient for that purpose, and if not, the balance not covered by the rents of this lot to be paid out of his general estate.

"Where an interest or estate is given by a deed or will with a limitation over on a specified contingency, such limitation, if it violates the rule against perpetuities, is, for the purpose of determining the effect on the prior disposition of the property, to be considered as stricken out, leaving the prior disposition to operate as if the limitaton over had never been made." Am. & Eng. Enc. Law, 2nd ed. vol. 22, p. 723, citing Lovering *v.* Worthington, 106 Mass. 86, and Leonard *v.* Burr, 18 N. Y. 103.

It is contended, however, by the defendants that, while admitting the general doctrine that a valid trust may stand where an invalid one must be rejected, this doctrine cannot be here applied to give effect to the sixth clause of the will in favor of the complainant. It has been argued on behalf of the defendants that all the authorities cited by the complainant's counsel in support of the application of the doctrine to this case, are confined to cases where it has been held that "where a testator creates a trust running through more than two lives," the trust may be declared good as to the two lives in being, and invalid as to the lives which are to follow. It is insisted, however, that that is an entirely different proposition from the one involved in this case; that in this case the property goes into the hands of the

trustees for a specific period, to wit, until 1928; and that this, according to the authorities, is void.

It is also urged that the whole scheme of the will shows that so far as the Washington property is concerned, the testator intended that it should be held by the trustees until 1928, and that such a will cannot be sustained in part and void in part, as such an interpretation would interfere with the intention of the testator. If this is the correct interpretation of this will, it follows that this annuity or rent-charge in favor of the complainant must be held invalid along with the other invalid conditions of the will as in violation of the law relating to perpetuities. The title to No. 611 M street which the trustees are to hold during the life of Miss Jordan for her use and benefit to the full extent of the rents and profits thereof is disposed of to Thomas K. Vertner in item 8 of the will, wherein it is provided in substance, as we have already seen, that at her death the fee-simple title to said lot shall vest in Thomas K., provided however that if Miss Jordan dies before January 1st, 1928 then he shall only take the rents and profits derived by said trustees therefrom, and provided further that should Miss Jordan die before Thomas K. shall have attained the age of twenty-one years then from the date of her death until Thomas K. arrives at the age of twenty-two years the rents and profits from said lot shall be disposed of in the same manner as provided in item 7, from which it seems to follow
37 that the absolute title shall not vest in him until 1928. Therefore it is insisted, as the power of alienation is suspended until 1928, and as Miss Jordan may die at a date more than twenty years before 1928, such suspension of the vesting of the title and of the consequent power of alienation is unlawful and the entire will fails.

Does the fact, however, that this property is thus placed in the hands of the trustees for a specific period, to-wit—until 1928,—thereby suspending the power of alienation until at least that date,—also render unlawful the annuity or rent-charge against the same property in favor of the complainant during her own life? To answer this question correctly involves a consideration of the primary purpose of the testator's will, if such primary purpose exists and is clearly distinguishable and separable from the other provisions of this will.

Intention.

"In construing a will it has been said that the intention of the testator is the polar star by which the court should be guided, provided no rule of law is thereby infringed." Broom's Legal Maxims, p. 409.

"In other words, the first thing for consideration always is what was the testator's intention at the time he made the will, and then the law carries that intention into effect as nearly as it can, according to certain settled technical rules." *Ib.* 410.

Yet this is to be observed with these two limitations, first, his intent ought to be agreeable to the rules of law; second, his intent ought to be gathered out of the words of the will. *Ib.* 412.

Applying these rules of interpretation to this will, it is manifest that it is the plain duty of the court to overrule this demurrer. Considering its several clauses in the light of the whole instrument and applying thereto the recognized rules of construction, it seems clear, that, so far as lot No. 611 M street is concerned, the primary purpose of the testator in writing into his will items 6 and 8 was to provide therefrom, that is, from the rents of said lot, for the support and maintenance of his niece during her life, and to that end he *first* charged or encumbered the lot to the extent of the total rents thereof during her life, as well as the *entire estate* with such *additional sum* as the trustees might find necessary to enable them to pay to her a monthly income of forty dollars, and, *secondly*, that upon her death, if she died on or after January 1st, 1928, the absolute title thereto was to vest in his grandson Thomas K., but if she died before 1928 he was to take title at the latter date, but not before. And in making this provision for the support of his niece during her life he was careful to see to it that this proivsion should not be involved in any entangling alliances with the other trust provisions of his will. Hence he left it in such shape that the trust in favor of Miss Jordan could be effectuated and carried out to its fullest completion without let or hindrance so far as his trustees, or the other beneficiaries of his will were concerned. This presents a
38 case of two separate and independent trusts in respect of the same property, the primary trust being in the nature of a rent-charge upon this lot for the support of the complainant during her life, and the secondary trust vesting the fee simple title to the same property in his grandson after such property had served the full purpose of the primary trust, and after the expiration of the period limited by the will when the title thereto could vest in said grandson. Being the absolute owner of the property and competent to make a will, the testator had the right to make such disposition of his property and to create such trusts as he deemed necessary to effectuate his purpose, providing that such disposition and trusts were not illegal in themselves, or did not violate any positive rule of law or statute, applicable thereto. Although it is conceded, as we have already seen, that the devise to Thomas K. Vertner is void, because in violation of the law pertaining to perpetuities, it does not follow that the trust created in favor of the complainant is void for the same reason. In the first place, it is not illegal in itself, and in the second place it is easily separable from the other provisions of the will, and is in no wise dependent upon them either for its origin or execution. It stands alone, and upon its own merits, as representing a separate and independent purpose. It is apparent that this view of the subject was not brought to the attention of the justice who passed the decree upon the original bill now under review.

In the last item but one of the will, the testator directs that Thomas K. Vertner shall be vested with the title and ownership of the F Street property (provided his mother is not living) in 1928, but he does not provide that he shall take the title to the M Street property at the same date, as the vesting of the title thereto is absolutely suspended until the death of the complainant. This is in effect a

reiteration of his declared intention as we find it in the sixth item of his will that the title to the premises 611 M street shall remain in his trustees for the benefit of his niece as long as she lives, thus indicating a purpose to create, and, in fact, creating, a separate and individual trust for his niece during her life.

Indeed, items six, seven, eighteen, nineteen and twenty-one each and all support the contention that the testator intended and does treat the allowance or provision made for Miss Jordan as an independent and separate legacy, and therefore in restoring to the complainant the annuity provided for her, it is not necessary in order to give full effect thereto to restore the will in its entirety, for the simple reason that the will under consideration is one in which separate and distinct trusts are created. The trust in favor of the complainant is in the nature of a rent-charge, which is something reserved out of realty or fixed as a burden on an estate in lands, and in this case can be enforced by an appropriate proceeding as though it were the sole provision of the will. Item six of this will in no way touches the estate or restrains its alienation, while the balance of the will deals with the estate itself and provides for its
39 alienation, but, unfortunately for the beneficiaries therein named, unlawfully limits the period when it is to take effect. These latter provisions being void because the limitation extends beyond the period of perpetuity, it becomes the duty of the court to construe the balance of the will as though such clause or clauses were not inserted in it, providing the manifest intention of the testator will thus be carried out.

The authorities are numerous in support of the proposition that if the purposes of the trust are separable and some of them are void because they fall within the inhibition of the rule against perpetuities and others are free from such objections, those which are within the period are sustained though the others must be declared void.

In the case of Savage *v.* Burnham, 17 N. Y. 561, the testator devised his real and personal property upon these trusts: First, to sell the real estate after the death of the widow. The sons to receive their shares when they attaind the age of twenty-one years and the daughters when they are married. In this case, the court held the trusts to be valid. But, the limitations expressed in the will, by which *the share of each son* dying under twenty-one and daughters without issue, was to go to the surviving children upon the same contingency as to each taker as that on which an original share would have vested, were declared void because suspending the absolute ownership of such shares during one or more minorities in addition to the life of the widow and the first taker. The court held that the main intent of the testator was preserved by supporting his primary disposition, although the ulterior limitations were defeated. The court in discussing this question said:

"It has sometimes been said that the maxim 'void in part void in toto' expressed a general principle of law; but in reality it does not, as every one must see on a moment's reflection. In the nature of things, in reason and above all in justice, it may and must be true that a deed or will or other instrument can in part be good

although another part is void, because in contravention of positive law."

Further on in the opinion the court says:

"Can those ulterior limitations be dropped and the primary dispositions of the estate be allowed to stand? This should be done if the intention of the testator will thereby be effectuated rather than defeated. It is easy of demonstration that such will be the case. In solving such an inquiry we are entitled to look not only at the will, but at the external circumstances in order to see its practical results."

This case is cited with unqualified approval in the subsequent case of Harrison *v.* Harrison, 36 N. Y., 547.

That it was the intention of the testator that the provisions of his will relating to the complainant should be recognized and treated as a separate and independent trust is plainly manifest from the safe-guards that he throws about it wherever he touches upon the subject in his will. For instance, in item twenty-one he says:

"For fear that there may be some difficulty in construing the different provisions of the will, relating to the monies which may come into the hands of the trustees herein named, I desire to say that it is my intention that all the monies arising from the rents of the Washington property, except that which is to go to Gabriella K. Jordan, shall be placed in the common fund for the payment of taxes and insurance on said property" &c.

He thus makes plain his purpose that the monies thus coming into the hands of his trustees shall be divided so that all the moneys arising from the rents of his Washington property, except the rents accruing from 611 M street, shall be placed in a common fund, while the rents from the latter shall be set apart and maintained as a separate and distinct fund for the use and support of the complainant during life. This was not only a legitimate, but a perfectly natural thing for him to do. The complainant was his niece, a child of his sister, and, therefore, it was most reasonable and natural that he should thus make separate provisions for her and to make it a charge upon specific property, so as to insure to her a reasonable sum for her support so long as she might live, and at the same time he was properly careful to so make it as not to interfere with the alienation of the property itself.

In the case of Dupre *v.* Thompson, 8 Bar. 537, the court held that although certain trusts in a conveyance were void as suspending the power of alienation, yet where the other trusts are valid the whole instrument will not be declared void, providing the legal parts do not *of necessity* uphold the illegal parts.

To the same effect are also James *v.* Veasley, 14 Hun. 523; Burley *v.* Everlyn, 16 Sim. 294; Gladdner *v.* Hancock, 16 Sim. 371.

If I am correct in this view, then such intention should be carried out unless the *purpose* is unlawful (which it is not) or it defeats the general scheme of the will. Instead, however, of defeating the general scheme of the will, complete effect can be given to item 6 without relying in the least upon the other clauses of the will, as the com-

plainant can take under that clause of the will without regard to whether the other clauses thereof are good or bad, within the meaning of the law relating to perpetuities. The trust created in her favor is a separate and independent trust that terminates at her death without regard to whether she dies before, on, or after January 1st, 1928. The mere fact that the secondary trust in favor of Thomas K. is unlawful, by reason of the unlawful limitation placed upon it, cannot defeat the primary purpose of the testator, or in other words the primary trust itself, it being a perfectly legitimate and legal trust; nor would such primary trust fail had the testator not named trustees to carry it out, as it is a rule of equity that a trust will not fail for the want of a trustee, since courts of equity have the power to supply the necessary trustee. Whether
41 the secondary trust in favor of Thomas K. Vertner is void because it is subject to a limitation which renders it inalienable beyond the period allowed by law, that is, beyond a life or lives in being and twenty-one years thereafter, as provided in the act of Congress of February 27th, 1801, and as defined by the Supreme Court of the United States in the case of Ould *v.* Washington Hospital, 95 U. S. 303, or whether it is void because it comes within the rule laid down by the New York court of appeals in Cruinkshank *v.* Home for the Friendless, 113 N. Y. 337, namely, because there is contemplated "a period measured by years and not by lives in being during which there will be no persons in existence by whom an absolute estate in possession could be conveyed," thus bringing it within the rule of unlawful suspension of the power of alienation, is wholly immaterial, if the court is correct in concluding that the primary trust in favor of the complainant is a separable and independent trust. The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but such ulterior limitation will be cut off in the case of a trust which is not an entirety as well as in the limitation of a legal estate. Or, to put it differently, a trust created for two or more purposes, one lawful and another unlawful, is good for the lawul purpose though void as to the unlawful one, and therefore where property is vested in trustees upon various trusts some of which are valid and others void, it is the duty of the court to separate those which are legal and valid, if they can be separated, from those which are illegal and void. This, however, may not be done if it defeats the general scheme of the will, nor, if the otherwise valid trust is dependent upon the illegal and void trust for its own validity and execution.

In case of Shipman *v.* Rollins *et al.*, 98 N. Y. 311, furnishes a good illustration of an inseparable trust. It was there held that inasmuch as the bequest was void because it was not to be paid over until after the determination of *three lives in being at the death of the testator,* thereby resulting in an illegal suspension of the powers of alienation beyond *two lives,* the bequest of the *income of the fund* was likewise void. The foundation being condemned, the superstructure resting upon it fell with it.

Read syllabus at page 311.

Read opinion at page 330.

The case of Tiers *vs.* Tiers, 98 N. Y. 568, furnishes an equally apt illustration of separable trusts. There the court held that where the ulterior contingent limitation was separable from and merely incidental to the primary trust, its failure did not affect the validity of such trust.

Read entire opinion at pages 572, 573, 574.

Among other cases cited by counsel for defendants were Armory *v.* Lord, 9 N. Y. 403, and Knox *v.* Jones 47 N. Y. 389. While time will not admit of any attempt at reviewing these cases, as well as other cases cited by counsel, on both sides, it is sufficient to
42 say that in both of the cases just mentioned the court unhesitatingly recognizes the principle that a void trust when separable from a valid trust may be cut off. In each of these cases, however, the court was of opinion that this principle did not apply. These cases as well as the other cases cited on behalf of the defendants are, I think, clearly distinguished from the case at bar. The court in its opinion in the case of Armory *v.* Lord, in construing the will in that case said:

"The legal and valid objects of the trust, namely, the estate in the rents, profits, etc., devised for the benefit of the children, and the remainder in fee in the grandchildren are so mixed up with the illegal and void one (the life estate in the surviving husband or wife) that it is impossible to sustain the one without giving effect to the other."

Now, there is no such situation here. The trust created in favor of this complainant, as I have adready said, is in nowise dependent upon the other provisions of the will either for its origin or its execution. It stands separate and apart from all of the other provisions of the will. It is perfectly natural that the testator would do what he did. The complainant was his niece—not a member of his own individual household and not a member of the household of his daughter Mrs. Vertner. She was a relative who stood outside of both of these families and for whom the testator evidently had an affection which prompted him to make provision for her during her life-time. Therefore, he laid his hands upon one particular piece of his property, and he said in effect that while I shall write nothing in this will that shall affect the right of alienation of this property, I will write a provision that will ensure to this complainant, my niece, the sum of at least $40.00 per month during her natural life, and in order that her right to enjoy that income may not be in anywise defeated I will see to it that it shall not be alienated to her prejudice during her life-time, and that the rents arising from this property shall not be put into the common fund provided for in this will, but shall be kept separate and apart therefrom and used exclusively for the payment of this annuity; and, so considerate was he of her welfare and so determined was he that she should have at least $40.00 per month during her life-time, that he provided that if the rents of the M Street property were not sufficient to pay the $40.00 a month, then, in that event, it shall be, and is made, the duty of his trustees to make good the deficiency out of the balance of his estate.

So, as I have already said, wherever he touches upon the interest given to this niece, he indicates a purpose to keep the interest provided for her separate and apart from the residue of his estate, and safeguards it so that it will be paid to her by his trustees, no matter who they may be and no matter what may be the outcome of the other trusts sought to be created by the will. In other words, in the case at bar the will segregates a certain piece of real estate from the entire holdings of the testator and appropriates the rents and profits thereof to the separate and individual use of one beneficiary.

Therefore, no matter what may happen, the circumstance
43 that the limitation may or may not be good can not invalidate the preceding life estate or life interest in the rents and profits of such property.

It is proper to say in conclusion that, apart from the trusts created in favor of the complainant, a trust is also created by this will in favor of Lillie K. Vertner, whereby under the seventh clause of his will she is to take the fee-simple title to the vacant lot on 20th street upon her attaining the full age of 19 years, providing the testator made no improvements thereon during his lifetime, but if such improvements were made, then, in that event, the fee-simple title is not to vest in her until the 1st day of January 1928. No testimony was taken under the original bill as to this or any other matter of fact necessary to be established in order to aid the court in the construction of said will. While I am advised by the solicitors on both sides that no such improvements were made, still, in the absence of a stipulation to that effect, the statement of counsel in open court cannot supply the place in the record of formal testimony as to this matter. Assuming that no such improvements were made, it follows that Dr. Kearney did not die intestate as to all of his real estate situate in the city of Washington, but on the contrary he died testate as to his vacant lot on 20th street, and his trustees take and hold the title thereto for the purpose therein named, while the annuity in favor of Miss Jordan stands as an incumbrance or rent-charge primarily against lot No. 611 M street, and secondarily against his entire estate for any balance of $40.00 per month that the rents of said lot 611 M street may not yield.

The decree, therefore, should be drawn in acordance with these suggestions, and if such stipulation is entered into as suggested, then the cause will be referred to the auditor to ascertain and report to this court as to the rents and profits of 611 M street and the amount due therefrom to the complainant.

THOS. H. ANDERSON,
Associate Justice.

(17) *Petition.*

Filed July 7, 1904.

To the supreme court of the District of Columbia, holding an equity court:

Your petitioner respectfully represents and shows as follows:

1. That she is the complainant in the above entitled cause, and

that after the argument of this cause on demurrer, and after the court had delivered a written opinion overruling the said demurrers of defendants, Constance K. Vertner, Lillie K. Vertner and Elijah S. Drake, trustees, but before the decree could be signed the said defendants, Constance K. Vertner, died testate on or about the 6th day of June, A. D. 1904.

44 2. That the only heirs at law of the said Constance K. Vertner are her children, Lillie K. Vertner, Thomas K. Vertner, and Edmund K. Vertner, who are all of them defendants in this cause; the said Lillie K. Vertner having appeared by counsel, and the said Thomas K. Vertner and Edmund K. Vertner by their guardian *ad litem*.

3. That by the last will and testament of said Constance K. Vertner, dated the 7th day of March, A. D., 1903, Charles S. Landram and John A. Broaddus, both of Luray, State of Virginia, were constituted executors of the said will, and have duly qualified as such.

Wherefore, the premises —, your petitioner prays:

1. That this honorable court will pass an order making the said Charles S. Landram and John A. Broaddus, executors, parties to this cause, and that a subpœna issue out of this honorable court commanding them to appear and be made parties to this suit.

2. And for such other and further relief as the nature of the case may require.

GABRIELLA K. JORDAN,
By CHARLES F. WILSON,
Attorney in Fact.

(18) *Copy of Mrs. Vertner's Will.*

Filed July 7, 1904.

I, Constance Kearney Vertner, of the town of Luray, Page county, Virginia, do make this, my last will and testament, as follows:—

I direct that all my debts and funeral expenses be paid by my executors, hereinafter named, as soon after my death as conveniently may be. And as to such worldly estate as I may die seized or possessed of, I dispose of the same as follows:—

(1.) First, the property owned by me in the city of Washington, D. C.; consisting of a lot of ground fronting one hundred and fifty feet and ten inches on "F" street N. W. and running back along "20th" street ninety six feet and four inches, upon which lot there are situated eight three story and basement dwelling houses, being numbers 2000, 2002, 2004, 2006, 2008, 2010, 2012 and 2014, all fronting on "F" street, N. W., and all being lots numbers twelve and thirteen, square one hundred and four of said city, leaving a vacant lot on the same square and in the rear of the said eight houses, which vacant lot fronts about eighteen feet on 20th street and runs back one hundred and fifty feet and ten inches, the said vacant lot being also my property.

I also own in the said city of Washington two other lots, with the improvements thereon, known as lots numbers 611 and 613 "M"

street N. W. All of the foregoing property I wish to be kept
45 intact until my youngest son, Thomas Kearny Vertner, attains the age of twenty-one years, and the rents and profits thereof to be collected by my executors and applied by them as hereinafter provided. As soon after my son, Thomas Kearny Vertner, attains his majority as is deemed practicable and expedient by my executors I direct that the said property be sold by them upon such terms as to cash or credit as to them may appear reasonable and proper and the proceeds of sale, after the payment of expenses of sale, be paid in equal shares or amounts to my three children, Lily Kearny Vertner, Edmund Kearny Vertner, and Thomas Kearny Vertner, except that I wish my daughter, Lily Kearny Vertner, to receive one-sixth more of the net proceeds of sale than my two sons named above.

The foregoing provisions relating to the said property, both as to the rental and sale, are made subject to the dower rights therein of Mrs. Mary Brandon Kearny, the widow of my deceased brother, Edmund Kearny, and in the event of her death before a sale of the said property as above directed it is my will and desire that my said daughter, Lily Kearny Vertner, shall receive out of the rents and profits of the said property the same amount as received by the said Mary Brandon Kearny until there shall be a sale of the same, as aforesaid. The rest of the said rents and profits shall be paid by my said executors in equal shares or amounts to my three children named above, and when the said property is sold one-sixth part of the net proceeds of sale shall be first paid to my said daughter and the residue thereof shall be equally divided between my said three children.

I wish however that my said sons shall each go to some college or university for the education of young men for a term of three years and that a sufficient sum be appropriated by my executors from the rents and profits of the said property for that purpose before there shall be any distribution thereof as above provided. In the event of my death before my said son, Thomas Kearny Vertner, becomes twenty-one years of age and in the judgment of my executors the occasion arises when it would be to the best interest of my said children that the said property should be sold during the minority of my said son my executors are authorized and empowered to make such sale under the terms and conditions above expressed, the proceeds of such sale to be securely invested by them until my said son arrives at the age of twenty-one years. Secondly, whatever interest I may have or receive under the will of my father, Thomas Kearny, in and to his ranch lands situated in Webb county, Texas, known as the "Galvan ranch" I give, devise and bequeath the same to my daughter, Lily Kearny Vertner, forever.

Thirdly, I own and hold at the present time the following shares of stock in the corporations mentioned:—

One share of stock in the Laguna Chica Plantation Company, of St. Louis, Missouri, par value $100.00, certificate No. 226.

46 One hundred shares of the stock of the Doremus Automatic Vending Company, of New Jersy, par value $100.00, certificate No. 398.

One hundred shares of the stock of the Birmingham-Beaumont Oil and Transportation Company, of Birmingham, Alabama, par value $10.00, certificate No. 4192.

Two hundred shares of the Mobile-Beaumont Oil Company, of Mobile, Alabama, par value $20.00, certificate No. 2680.

The shares of stock in the first named company I give and bequeath to my daughter, Lily Kearny Vertner, and the shares of stock in all of the other companies mentioned I give and bequeath to my two sons Edmund Kearny Vertner and Thomas Kearny Vertner to be held by them jointly.

Fourthly, the household furniture contained in the residence in Luray, Virginia, occupied by me I wish to be sold by my executors and the proceeds equally divided among my children.

The books and pictures in the said residence are not to be sold however but shall be equally divided among my children. All of my silver ware and jewelry and personal wardrobe I give and bequeath to my daughter Lily Kearny Vertner.

Fifthly, I give and bequeath to Mrs. J. V. S. Harris, of Fort Gibson, Mississippi, the sum of one thousand dollars, and to Misses Amanda Davis and Mary Jane Davis, of Luray, Virginia, I give and bequeath the sum of one hundred dollars, each, and I charge all of my estate, both real and personal, with the payment of the said legacies. I prefer however that the same be paid out of the rents and profits of my Washington city property or from the proceeds of the sale of the same as heretofore directed. If the rents and profits of the said property do not justify it, having due regard to the maintenance and support of my children and the education of my two sons as above provided, my executors are directed to withhold the payment of the legacy of one thousand dollars to the said Mrs. J. V. S. Harris until there shall have been a sale of the said property.

Sixthly, all the residue of my property, both real and personal, wherever situate, I give, devise and bequeath, to my three children heretofore named.

Seventhly, having full confidence in the probity and business capacity of Charles S. Landram and John A. Broaddus, of Luray, Virginia, I hereby nominate and appoint them as the executors of this my will and desire that no security shall be required of them as such. I also appoint them as the guardians of my son, Thomas Kearny Vertner, during his minority.

Eighthly, I hereby revoke all previous wills and codicils hitherto made by me.

Witness my hand and seal this 7th day of March, in the year 1903.

CONSTANCE KEARNY VERTNER. [SEAL.]

47 Signed, published and declared by Constance Kearny Vertner, as and for her last will and testament, in the presence of us, who in her presence, at her request, and in the presence of one another, have hereunto subscribed our names as witnesses.

WM. L. HUDSON.
F. W. WEAVER.
E. T. BOOTON.

Codicil.

I, Constance Kearny Vertner, of Luray, Page county, Virginia, do make this codicil to my last will and testament, above written, which is to be taken as a part thereof.

I hereby reduce to the sum of eight hundred dollars ($800.00) the pecuniary legacy of one thousand dollars, ($1,000.00) given in the fifth clause of my said last will and testament, to Mrs. J. V. S. Harris, of Fort Gibson, Missi-ppi, and the sum of two hundred dollars, ($200.00) the difference the said two sums of money, I direct shall be added to the legacies given in the said clause to Misses Amanda Davis and Mary J. Davis, of Luray, Virginia, thereby increasing the legacy of each of them from one hundred dollars ($100.00) to the sum of two hundred dollars ($200.00).

In testimony whereof, I have hereunto affixed my hand and seal this 14th day of May, 1904.

CONSTANCE KEARNY VERTNER. [SEAL.]

Signed, published and declared by Constance Kearny Vertner, as and for a codicil to her last will and testament, in the presence of us, who, in her presence and at her request, and in the presence of one another, have hereunto signed our names as witnesses thereto.

WM. L. HODSON.
F. W. WEAVER.
E. T. BOOTON.

At a circuit court held for Page county June 21st, 1904.

The last will and testament of Constance Kearney Vertner, deceased, of Luray, Virginia, with codicil thereto attached, was presented to the court proved by the oaths of Dr. W. L. Hudson, E. T. Booton and F. W. Weaver the subscribing witnesses thereto and ordered to be recorded.

Teste: F. W. WEAVER, *C. C.*

(Endorsed:) Copy of will of Mrs. C. K. Vertner.

48 (19) *Order Making Charles S. Landram and John A. Broaddus, Executors, Parties Defendants.*

Filed July 7, 1904.

This cause coming on to be heard on the petition of the complainant, Gabriella K. Jordan, suggesting the death of the defendant, Constance K. Vertner, and having been submitted to the court, it is this 7th day of July, 1904, adjudged, ordered and decreed that Charles S. Landram and John A. Broaddus, executors of the last will and testament of the said Constance K. Vertner, be and the same hereby are made parties defendant to this suit. And it is further ordered that a subpœna issue out of this court commanding the said

Charles A. Landram and John A. Broaddus, executors, to enter their appearance in this cause.

THOS. H. ANDERSON, *Justice.*

(20) *Final Decree.*

Filed July 8, 1904.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 22729.

GABRIELLA K. JORDAN, Complainant,
vs.
ELIJAH S. DRAKE ET AL., Defendants.

This cause coming on to be heard on the demurrers of Constance K. Vertner, Lillie K. Vertner and Elijah S. Drake, trustee, defendants to the bill of review, and the same having been argued by counsel and considered by the court, it is this 8th day of July, A. D. 1904, adjudged, ordered and decreed that the said demurrers be, and the same are hereby, overruled. And the said defendants electing not to plead over but to stand on their said demurrers, it is further ordered that the complainant recover costs against the said defendants, except the defendants Elijah S. Drake and Leroy M. Taylor, trustees, to be taxed by the clerk, and that she have execution therefor as at law.

It is further adjudged, ordered and decreed that the decree of this court, heretofore passed on the 27th day of June, A. D. 1900, in equity cause No. 21,422, wherein the defendant Elijah S. Drake, trustee, was named as complainant and the defendants Leroy M. Taylor, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, Thomas K. Vertner and the complainant Gabriella K.
49 Jordan, were named as defendants, which decreed that as to the real estate situated in the District of Columbia, Thomas Kearney died intestate, and that the same descended to his heirs at law, be and the same is hereby modified in so far as it relates to the provisions of said will in regard to the devise of the annuity or legacy to the complainant Gabriella K. Jordan, which provisions are, and are hereby declared to be, valid, and it is further adjudged, ordered and decreed that the said annuity or legacy, for the full term of her natural life, bequeathed to Gabrielle K. Jordan, by the said last will and testament of said Thomas Kearney, is a valid claim or rent-charge, primarily against all rents and revenues collected or derived from lot No. 611 M street N. W., Washington, D. C., and secondarily against his entire estate for any balance of $40 per month, that said rents and revenues may not yield, from the date when the said legacy or annuity became due and payable, for any amount of principal or interest which may be due to said annuitant or legatee thereon.

It is further ordered that the right is hereby reserved to the complainant to apply to this court in the future for any further orders and decrees that may be necessary and proper to carry into effect this decree.

THOS. H. ANDERSON, *Justice.*

From the foregoing decree the defendants Charles S. Landram and John A. Broaddus, executors, Lillie K. Vertner and Elijah S. Drake, trustee, now here in open court note an appeal to the Court of Appeals of the District of Columbia, and pray the court that as to them there may be a severance for the purposes of said appeal, and that the penalty of a bond for costs be fixed by this court.

It is therefore, ordered this 8th day of July, A. D. 1904, that leave be, and the same is hereby, given to the said defendants to sever on appeal to the Court of Appeals from the foregoing decree, and that a bond in the sum of one hundred dolars ($100) for costs be given by the said defendant Elijah S. Drake, trustee, and a bond for one hundred dollars ($100) be given by the other defendants in this cause as required by the rules of this honorable court.

THOS. H. ANDERSON, *Justice.*

(21) *Memorandum.*

July 27, 1904.—Appeal bonds of Elijah S. Drake, trustee, and of Charles S. Landram and John A. Broaddus, executors of C. K. Vertner, deceased, and Lillie K. Vertner filed.

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 99, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 22,729, equity, wherein Gabriella K. Jordan is complainant, and Elijah S. Drake, trustee, *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 29th day of September, A. D. 1904.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Court of Appeals of the District of Columbia.

Case No. 1476.

CHARLES S. LANDRAM and Others, Executors, Etc., Appellants,
vs.
GABRIELLA K. JORDAN, Appellee.

Statement of errors for which the appellants prosecute this appeal and of the parts of the record which they think necessary to be printed for the consideration of the questions involved, made in pursuance of clause 5, rule 6, of the Court of Appeals *for* the District of Columbia.

Statement of Errors.

The suit of Gabriella K. Jordan *vs.* Elijah S. Drake, trustee, and others, in the supreme court of the District of Columbia, from the final decree in said suit, in which this appeal has been taken, was instituted for the purpose of reviewing and modifying the decree entered on the 27th day of June, 1900, in the cause of Elijah S. Drake, trustee, *vs.* Leroy M. Taylor, trustee and others, construing the last will and testament of Thomas Kearney, deceased, so far as the same devised or attempted to dispose of lands situated in the District of Columbia, and that the appellee be permitted to remain in the enjoyment of the rents and revenues derived from the real estate in the District of Columbia as provided in the sixth item of the said will, and that the court below erred in overruling the demurrers of the appellants and in entering a final decree on the 8th day of July, 1904, and in not sustaining appellants' demurrers and dismissing the bill of review of appellee.

51 *Parts of the Record which the Appellants Think Necessary to be Printed.*

All of the transcript of record filed herein, except parts which we designate to be omitted, as follows: Omit commencing with the word "certificate" page 34 to and including page 39; head of answer page 40, commencing with the words, "State of Texas" page 42 and page 43; head of answer page 44; answer of Leroy M. Taylor on pages 45 and 46; head of decree page 46; answer of Leroy M. Taylor page 48; head of demurrers pages 50 and 51; heading of opinion page 52; heading of petition page 84 and jurat page 85; heading of order page 91; designation of record on appeal pages 95 to 98 inclusive, and extension of time to file transcript page 99.

To Frank W. Hacket and Charles F. Wilson, attorneys for Gabriella K. Jordan.

GENTLEMEN: In accordance with the clause of said rule we hereby serve you with the copy of the foregoing statement of errors and parts of the record which the appellants think necessary to be printed.

JOHN J. HEMPHILL,
Solicitor for Appellants Landram and Broaddus, Executors of Vertner.

THOMAS P. WOODWARD,
W. MOSBY WILLIAMS,
Solicitors for Appellee Drake, Trustee.

Service of a copy of the foregoing acknowledged this 3d day of October, 1904.

FRANK W. HACKETT.

(Endorsed:) No. 1476. Chas. S. Landram *et al.*, appellants, *vs.* Gabriella K. Jordan. Appellants' assignment of errors and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Oct. 4–1904. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1476. Charles S. Landram *et al.*, executors, appellants, *vs.* Gabriella K. Jordan. Court of Appeals, District of Columbia. Filed Oct. 1, 1904. Henry W. Hodges, clerk.

52 WEDNESDAY, *March 8th, A. D.* 1905.

No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

The argument in the above entitled cause was commenced by Mr. W. Mosby Williams, attorney for the appellants, and was continued by Messrs. Charles F. Wilson and F. W. Hackett, attorneys for the appellee.

TUESDAY, *March 9th, A. D.* 1905.

No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

The argument in the above entitled cause was continued by Mr. F. W. Hackett, attorney for the appellee, and was concluded by Mr. J. J. Hemphill, attorney for the appellants.

On motion, both sides are allowed to file additional authorities herein if so advised.

53 No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a decree of the Supreme Court of the District sustaining a bill of review filed on October 29, 1901, by Gabriella K. Jordan against Elijah S. Drake and Leroy M. Taylor, trustees under the will of Thomas Kearney, deceased; Constance K. Vertner and Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, to review a decree rendered by said court on June 27, 1900, on a bill filed by Elijah S. Drake, trustee, against Leroy M. Taylor, Constance K., Lillie K., Edmund K., Thomas K. Vertner, and Gabriella K. Jordan.

It appears from the bill and exhibits that Thomas Kearney died in San Antonio, Texas, leaving a will dated June 4, 1896, by which he undertook to dispose of a large estate consisting of lands and personal property in the State of Texas, of lands in Virginia, and certain improved and unimproved real estate in the District of Columbia. Executors were appointed for the administration of the estate in Texas, and two trustees, Drake and Taylor, were appointed with general powers, and particularly for the management and control of so much of the estate as was situated in Virginia and the District of Columbia.

The will is a very long and elaborate one, giving full power of possession, control, and so forth, to the trustees, with directions concerning collecting rents, improving property, paying taxes, paying certain sums to testator's daughter and her children, and expressly directs that said possession and powers shall continue in said trustees and their successors until January 1, 1928.

The following items of the will only are of importance in the determination of this case:

"Item 6. I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' street N. W., Washington, D. C., but in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said sum of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof.

Item 7 contains directions concerning the lease and disposition of the income of all the real property in the District "except that derived from the house known as No. 611 M street, which shall be paid to my niece as provided in item 6 hereof."

"Item 8. It is my desire and my said trustees are hereby authorized and instructed that, upon the death of my said niece, Gabriella K. Jordan, the fee simple title to the house and lot, No. 611 M street, N. W., Washington, D. C., shall be and in hereby vested in my grand son, Thomas K. Vertner, provided, that should my said niece die before the 1st day of January, 1928, then in that event, said Thomas K. Vertner shall only receive the net rents and revenues derived by my trustees therefrom, and provided further that, should my said niece, die before my grand son shall have attained
54 the age of twenty-two years, then, from the date of the death of my niece, until the said Thomas K. Vertner shall have arrived at the age of twenty-two years the rents and revenues derived from said lot shall be disposed of in the same manner as provided in item 7 hereof in regard to the rents and revenues derived from other property mentioned therein, except the vacant lot on Twentieth street, N. W.

"Item 20. It is my desire and my trustees are hereby instructed to keep all the houses herein entrusted to them insured and in repair; to keep all taxes due or to become due thereon paid, and in case of the destruction or injury of them or any of them, to rebuild or repair them in accordance with the instructions in item 17 hereof.

"Item 21. For fear that there may be some difficulty in construing the different provisions of this [will] relating to the moneys which may come into the hands of the trustees herein named, I desire to say that it is my intention that all the moneys arising from the rents of the Washington, D. C. property, except that which is to go to Gabriella K. Jordon, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2)of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years respectively."

Leroy M. Taylor declined to accept the trust. Elijah S. Drake accepted and undertook its execution for several years, during which, it is alleged, he paid the sum of $40 per month to Gabriella K. Jordan. On May 15, 1900, Drake filed a bill in the Supreme Court of the District of Columbia against Taylor, who, it was alleged, had declined to accept the trust, Constance K., Lillie K., Edmund K., and Thomas K. Vertner, and Gabriella K. Jordan. The bill sets out the will and alleges as the reason for filing the same, that: "Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia, and your complainant is advised that the said provisions are void because they attempt to create a perpetuity."

The prayer is for the construction of the will.

Constance Vertner answered, alleging the invalidity of the will because it attempted to create a perpetuity. She also alleged that she and her brother, Edmund Kearney, were the sole heirs at law of the testator; that said Edmund Kearney died June 4, 1898, leaving a widow and no children, whereby defendant was his sole heir at law; and that Edmund Kearney left a will which was not so attested as to pass real estate in the District of Columbia. A guardian *ad litem* was appointed for the three infant defendants and filed a formal answer. Gabriella K. Jordan, who lived in New York, filed the following as her answer:

"This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in the said bill of complaint to be true."

Neither she nor Constance Vertner were represented by counsel, and it would seem that it was regarded by the court as a mere friendly proceeding. On June 27, 1900, the decree which is now sought to be reviewed was entered as follows:

"This cause having been calendared, was submitted on the pleadings filed therein and duly considered, it is, by the court, this 27th day of June, 1900, adjudged, ordered, and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered, and decreed that said provisions of said will are deemed and held to be void and of no effect and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs at law."

On October 29, 1901, subpœna on this bill of review was issued to all of the defendants and returned "Not to be found." April 7, 1902, alias subpœna was issued to all and returned "Summoned Leroy M. Taylor personally April 7, 1902, Aulick Palmer, marshal. No copies for other defendants." April 17, 1903, an order of publication was passed for all defendants except Taylor, and proof of publication was filed September 25, 1903.

Constance K. Vertner, Lillie K. Vertner, and Elijah S. Drake entered demurrers on November 5, 1903, on the ground that the bill stated no case for relief. The death of Constance K. Vertner, testate, was suggested on July 7, 1904, and on the same day her executors, Charles S. Landram and John A. Broaddus, were made parties defendant.

On July 8, 1904, the demurrers were overruled, and the defendants electing not to answer, a final decree was entered modifying the decree in the original suit, "in so far as it relates to the provisions of said will in regard to the devise of the annuity or legacy to the complainant Gabriella K. Jordan, which provisions are hereby decreed to be valid; and it is further ordered, adjudged, and decreed that the

said annuity for the full term of her natural life bequeathed to Gabriella K. Jordan, by the said last will and testament of said Thomas Kearney is a valid claim of rent-charge primarily against all rents and revenues collected or derived from lot No. 611 M street N. W., Washington, D. C., and secondarily against his entire estate for any balance of $40 per month that said rents and revenues may not yield, from the date when said legacy or annuity became due and payable, for any amount of principal or interest which may be due to said annuitant or legatee thereon." The decree further reserves the right to the complainant to apply for any further orders and decrees in the future that may be necessary and proper to carry the decree into effect. Landram and Broaddus, executors, Lillie
55 K. Vertner and Elijah S. Drake obtained a severance and perfected an appeal from said decree to this court. No appeal was taken on behalf of the infant defendants, but counsel have appeared on their behalf and made common cause with the appellants.

1. The contention that "the court erred in holding that the substituted service on the absent defendants, except Drake, by publication was valid, and that they were properly before the court for the purpose of making the decree that was entered," is without foundation.

It does not appear in the record that any such question was raised or ruled upon in the trial court. The parties appeared in answer to the publication of notice and made no objection thereto. Irregularity, if any, in obtaining the order of publication was waived by their general appearance.

2. There was no error in overruling the objection, presented on the hearing of the demurrer, that the complainants' right to maintain the bill of review had been lost by laches.

The bill was filed and writs of subpœna regularly issued thereon within the two years from the entry of the decree required by equity rule 88 of the Supreme Court of the District of Columbia. Alias process was also issued before the expiration of the two years, and served upon Taylor, one of the necessary parties in the District. Others were not found. The suit was thus commenced within any construction that may be given to common law rule 6, which applies to suits in equity also, and prosecuted in accordance with the provisions of equity rules 7 and 11. See Huysman *v.* Newspaper Co., 12 App. D. C. 586, 594.

It is true that there was considerable delay in prosecuting the notice by publication to the defendants shown to be non-residents. But there is nothing to show that this was unreasonable or attributable to bad faith. Webb *v.* Pell, 1 Paige Ch. 564; Fairbanks *v.* Farwell, 141 Ill. 354, 368.

Nor does it appear that any prejudice has been caused the defendants by the delay, and there is no question of intervening rights accruing during the interval.

3. The third error that has been assigned is founded on the refusal of the court to sustain the appellants' objection that Mary B. Kearney was a necessary party to the proceeding.

It is essential in a bill of review that all of the parties to the de-

cree and their privies shall be made parties either plaintiff or defendant. Bank *v.* White, 8 Pt. 262, 268. And it appears that this requirement was complied with.

The objection is that Mary B. Kearney, the widow of Edmund Kearney, should have been made a party also because, since the decree annulling the will a right of dower has accrued to her in the lands in the District of Columbia to the extent of the interest of her deceased husband, Edmund Kearney, as one of the heirs at law of Thomas Kearney, deceased.

The objection that she was a necessary party was not raised by plea, answer, or on the face of the demurrer, but by suggestion on the hearing founded solely on the fact recited in the answer of Constance K. Vertner to the original bill filed May 15, 1900, that Edmund Kearney died June 4, 1898, leaving a widow, Mary B. Kearney, and no descendants. No request was then urged that she be made a party to the suit, and the cause proceeded to final decree without her. It is to be remarked also that there is nothing to show that she was living at the time that the bill of review was filed.

But passing by the question whether a party interested in the subject-matter of the original bill and yet omitted therefrom can be considered a necessary party to review the decree rendered thereon, and assuming that Mary B. Kearney is still living, her interest is a contingent one and not so inseparably connected with the claim of the parties to the suit as to make here an indispensable party to this proceeding. Indispensable parties are said to be "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Shields *v.* Barrow, 17 How. 130, 139; see, also Story *v.* Livingston, 13 Pet. 359, 375; Barney *v.* Baltimore, 6 Wall. 280, 284; Williams *v.* Bankhead, 19 Wall. 563, 571.

We are of the opinion, therefore, that the objection made on the hearing came too late. Weightman *v.* Critic Co., 4 App. D. C. 136, 153; and cases cited. In one of the cases there cited it was said:

"It ought to be observed here, preliminarily, as a matter of practice, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing upon appeal, except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting. The objection should be taken at an earlier stage in the proceeding, by which great delay and expense would be avoided. The general rule as to parties undoubtedly is that when a bill is brought for relief all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions, and is more or less a matter of discretion in the court, and ought to be restricted to parties whose interest is

involved in the issue and to be affected by the decree. The relief granted will always be modified so as not to affect the interests of others." Mechanics Bank *v.* Seton, 1 Pet. 299, 306.

Whatever interest Mary B. Kearney may have is not concluded by the decree rendered herein, and may be asserted by her hereafter if desired.

4. Having disposed of the foregoing preliminary questions, we come now to the consideration of the merits of the case as presented in the bill. In this we do not find it necessary, or that it would serve any useful purpose, to accept the invitation of counsel and enter upon the consideration of the question whether the general trusts created by the will of Thomas Kearney, as decreed on the original bill, are in fact void because in violation of the rule against
56 perpetuities. In the view that we have taken of the complainant's case, she has no direct interest in that question which renders its determination necessary, or even proper, under the circumstances. All of the parties whose interests were directly and materially affected by that part of the decree have not only acquiesced in it, but have appeared in this court also in its support.

By the terms of her bill the complainant limits her right of review to so much of that decree only as undertakes to annul the trust for her benefit in lot 611 M street N. W., and in so far as it may affect her contingent right to a monthly income of $40 during life, to be made up from the revenues of other property in the District of Columbia, in the event that the revenues of said lot shall fall short of realizing that sum.

Upon the assumption, then, of the correctness of the original decree, in so far as it declared void the several trusts of the will for the benefit of testator's daughter and grandchildren because violative of the rule against perpetuities, the contention is that the trust in favor of Gabriella K. Jordan, contained in item 6 of the will, necessarily fails with the others.

This result depends upon the inseparability of the special intention expressed in item 6 from the general intention expressed throughout in respect of the disposition of the great body of a large estate.

Undoubtedly, if it shall appear that the intention to create a trust for the life of Gabriella K. Jordan is so involved in the general scheme of the whole will as to be dependent upon it, and not capable of enforcement without doing violence to the general intention of the testator, it must fail along with the remainder of the will. Fosdick *v.* Fosdick, 6 Allen, 41, 48; Thorndike *v.* Loring, 15 Gray, 391, 398; Lovering *v.* Worthington, 106 Mass. 86, 88; Amory *v.* Lord, 9 N. Y. 403; Knox *v.* Jones, 47 N. Y. 389, 398.

On the other hand, a trust for general purposes may be void because unauthorized by law without necessarily rendering void a particular trust in the same will made to subserve another purpose that is authorized. Savage *v.* Burnham, 17 N. Y. 561, 576. And it is a rule, founded in reason as well as supported by authority, that if under settled principles of law effect can not be given to an entire will or to certain entire provisions thereof, any provision may never-

theless be given effect which is conformable to those principles, and which can be separated from the residue without doing violence to the testator's general intention. In other words, where an estate has been vested in trustees upon several independent trusts, one of which is legal though others may not be, the estate of the trustees will be upheld to the extent necessary to enable them to execute the valid trust though avoided as to the others. Oxley *v.* Lane, 35 N. Y. 340, 349; Van Schuyver *v.* Mulford, 59 N. Y. 426, 432; Tiers *v.* Tiers, 98 N. Y. 568, 572; Burnes *v.* Allen, 89 Hun, 552, 558; S. C. affirmed, 154 N. Y. 741; Loring *v.* Blake, 98 Mass. 253, 262; Lovering *v.* Worthington, 106 Mass. 86, 88; Graham *v.* Whittridge (Md. 1904), 57 Atl. Rep. 609.

Tested by these principles, we are of the opinion that the trust created for the benefit of Gabriella K. Jordan in item 6 of the will of Thomas Kearney is a valid one and may be executed without regard to the failure of the remaining trusts for the benefit of other objects of the testator's bounty, and that it was manifest error to declare that provision of the will void along with the others, as was done in the original decree. In that provision (item 6) the testator expresses a particular and independent intention to provide an income for Gabriella K. Jordan during her life and expressly separates lot No. 611 M street N. W. from the residue of his estate in order to effect that intention. This intention to separate that lot from the rest of the estate is further shown in the special exceptions contained in items 7 and 20, before mentioned. Moreover, item 8 provides that upon the death of the life beneficiary, Gabriella K. Jordan, "the fee simple title to the house and lot No. 611 M street N. W. shall be and is hereby vested in my grandson, Thomas K. Vertner." This is followed by the words "provided my said niece die before the 1st day of January, 1928, then and in that event said Thomas K. Vertner shall only receive the net rents and revenues derived by my trustees therefrom, and provided further, that should my niece die before my said grandson shall have attained the age of twenty-two years, then from the date of the death of my niece until the said Thomas K. Vertner shall have arrived at the age of twenty-two years the rents and revenues derived from said lot shall be disposed of in the same manner in item 7 hereof in regard to the rents and revenues derived from other property mentioned therein," etc.

The first clause of item 8, before quoted, vests a remainder in fee in said lot in the grandson Thomas K. Vertner, to come into possession and enjoyment upon the termination of the trust for life for the benefit of Gabrielle K. Jordan created by item 6. Richardson *v.* Penicks, 1 App. D. C. 261, 264: and cases cited. Conceding, as in the case of the general trusts, that the attempt in the foregoing provisos to postpone the enjoyment of the estate of the grandson may be in contravention of the rule against perpetuities, the result is the avoidance of their restraints without affecting the devise of the remainder. Neither the devise of the equitable life estate of the niece nor the remainder in fee can be rendered void by an unlawful attempt to postpone the enjoyment or restrain the alienation of the fee. Leonard *v.* Burr, 18 N. Y. 96, 106; Goldsborough *v.* Martin,

41 Md. 488, 502, 503; Lovering *v.* Worthington, 106 Mass. 86, 88; 2 Perry on Trusts, sec. 622; Saunders *v.* Vautier, 4 Beav. 115; Curtis *v.* Luken, 5 Beav. 147, 155. Our conclusion is, therefore, that the provisions of the will relating to Gabriella K. Jordan are separable from and independent of the others, and should have been upheld in the original decree.

The learned justice presiding in the equity court was right in the decree rendered by him modifying the original decree to that extent. If it shall become necessary, the court may, under its general equity jurisdiction, appoint another trustee, for the purpose of giving effect to the execution of the trust, and there is nothing to prevent the complainant from pursuing some appropriate proceeding
57 to enforce the payment of the arrears of the revenues to which she is entitled.

5. We have also been asked, on behalf of the appellee, to declar the original decree invalid on the ground of a want of jurisdictio of the court to entertain the bill filed by the trustee for the purpose of annulling the entire will under the pretense of seeking a construction of the trusts created thereby. The suit was, indeed, an extraordinary one, and the manner in which it was prosecuted to a final decree vacating each and all of the trusts would seem to warrant the inference, to some extent, that such was the real object sought. But for the reason given for not passing upon the validity of the will as a whole, we regard it as unimportant to determine any other question than that in which the interests of the complainant are necessarily involved.

For the reasons heretofore given the decree will be affirmed, with costs, and it is so ordered.

Affirmed.

58 TUESDAY, *April 4th, A. D.* 1905.

No. 1476. April Term, 1905.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased; LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

April 4, 1905.

THURSDAY, *April 13th, A. D.* 1905.

No. 1476. April Term, 1905.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased; LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

On motion of Mr. J. J. Hemphill, of counsel for the appellants in the above entitled cause, It is by the Court this day ordered that said appellants Charles S. Landram and John A. Broaddus as Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, be and they are hereby allowed to sever from their co-appellant Elijah S. Drake, Trustee, upon their appeal to the Supreme Court of the United States from the decree of this Court passed herein on the 4th day of April A. D. 1905.

Per MR. CHIEF JUSTICE SHEPARD.

April 13, 1905.

59 No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased; LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

On motion of Mr. J. J. Hemphill, of Counsel for the appellants in the above entitled cause, and it appearing that the amount in controversy exceeds the sum of $5000, It is ordered by the Court that the appellants Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars, and the bond to act as supersedeas is fixed at the sum of twenty-five hundred dollars.

60 *Bond on Appeal.*

Know all men by these presents, That we, Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner (now Lillie K. Vertner Jones), as principals and The United States Fidelity & Guaranty Company and Edmund K. Vertner, as sureties, are held and firmly bound unto Gabriella K. Jordan in the full and just sum of Two thousand and five hundred ($2,500) dollars, to be paid the said Gabriella K. Jordan certain attorney, executor, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of October, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, Lillie K. Vertner (now Lillie K. Vertner Jones), and Elijah S. Drake, trustee a decree was rendered against the said Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, Lillie K. Vertner and the said Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner (now Lillie K. Vertner Jones) having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Gabriella K. Jordan citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner (now Lillie K. Jones) shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAS. S. LANDRAM, [SEAL.]
Ex'or of Mrs. Constance K. Vertner, dec'd.
JOHN A. BROADDUS, [SEAL.]
Ex'or of Mrs. Constance K. Vertner, dec'd.
LILLIE K. VERTNER JONES. [SEAL.]
EDMUND K. VERTNER. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. S. SWORMSTEDT, *Attorney in Fact.*

[Seal of United States Fidelity & Guaranty Co.]

As to Chas. S. Landram and John A. Broaddus, Exers. of Mrs. Constance K. Vertner, dec'd.

Sealed and delivered in presence of

C. S. GRAYSON,
C. T. HOLTZMAN,
As to Lillie K. Vertner Jones.
JAMES H. TRAYNOR,
As to Edmund K. Vertner.
WM. S. HUDSON,
Witness as to the United States Fidelity & Guaranty Company.
ANNIE C. SCHUERMANN.

Approved by
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1476. Charles S. Landram *et al.*, Appellants, *vs.* Gabriella K. Jordan. Supersedeas bond on appeal to Supreme Court of the United States. Court of Appeals District of Columbia. Filed Dec. 12, 1905. Henry W. Hodges, Clerk.

61 UNITED STATES OF AMERICA, *ss:*

To Gabriella K. Jordan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, Lillie K. Vertner, Appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 13th day of December, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service of this citation accepted and acknowledged this 14- day of Dec'r 1905.

FRANK W. HACKETT,
CHARLES F. WILSON,
Attorneys for Gabriella K. Jordan, Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 15, 1905. Henry W. Hodges, Clerk.

62 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 61, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased; Lillie K. Vertner, and Elijah S. Drake, Trustee, Appellants, *vs.* Gabriella K. Jordan, No. 1476, October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22nd day of December, A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,042. District of Columbia, Court of Appeals. Term No. 540. Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, Appellants, *vs.* Gabriella K. Jordan, Filed January 10th, 1906. File No. 20,042.